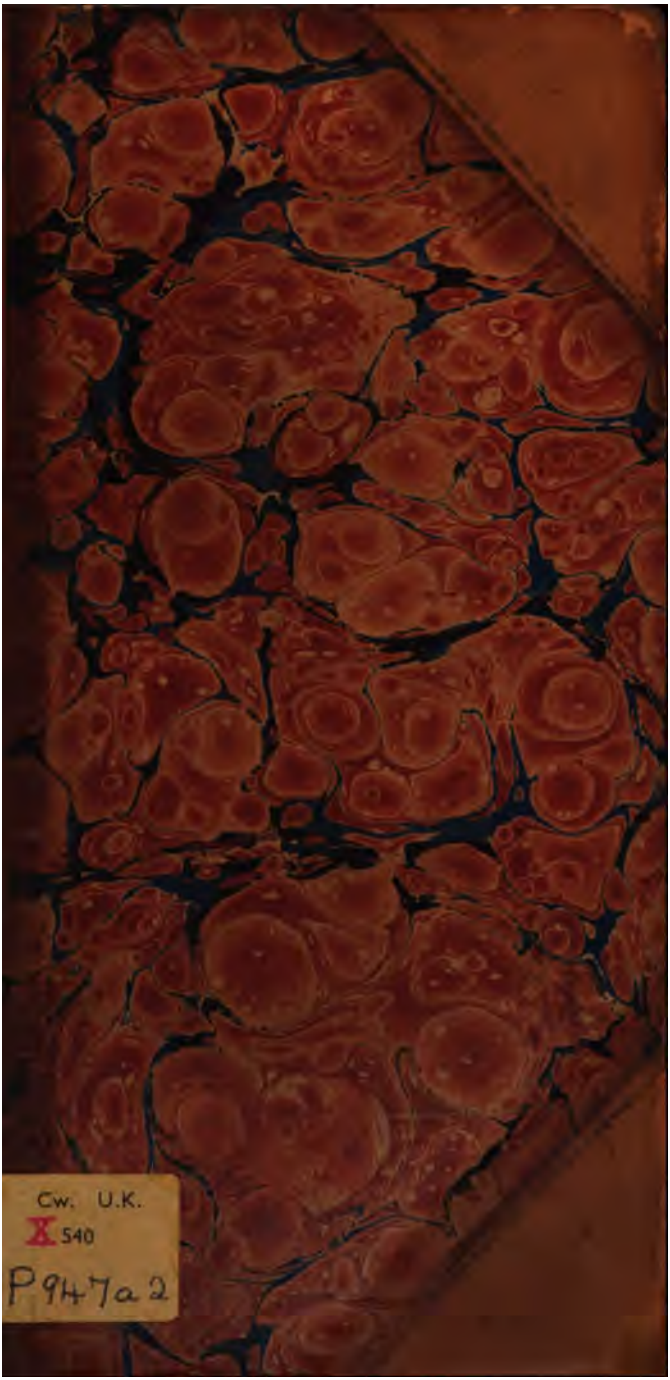

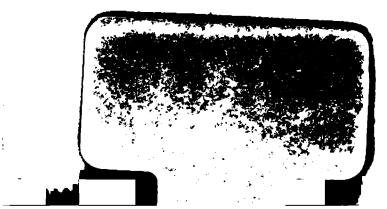

THE LAW

OF

JUDGMENTS

AS THEY AFFECT

REAL PROPERTY.

BY

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OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

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PREFACE

TO THE SECOND EDITION.

THE favour with which the first edition of this little work has been received induces the author to hope that it has been found of some utility. The preparation of the present edition has afforded him an opportunity of considering at some length the important case of *Whitworth* v. *Gaugain;* and he has spared no labour in endeavouring to supply whatever additional information seemed to come properly within the limits of his subject.

As the old law has not been repealed, and purchasers and mortgagees without notice are still unaffected by the provisions of the statutes of Victoria for enlarging the rights of the judgment creditor, it has been the

object of the author to consider, in the first place, the law as it stood prior to those statutes; and, secondly, the effect of judgments upon the lands of the debtor under their provisions

Chancery Lane,
12*th November,* 1842.

TABLE OF CASES.

JUDGMENTS

AS THEY AFFECT

REAL PROPERTY.

JUDGMENTS BEFORE THE RECENT STATUTES.

At common law, the goods and chattels of the debtor under a writ of *fieri facias*, and the growing profits of his lands under a writ of *levari facias*, were the only things which could be taken in execution by the creditor on a judgment for debt or damages, and even of the growing profits of the land he might be deprived by a subsequent alienation of the land itself.[a] To provide a more effectual remedy the 13th of Edw. 1. st. 1, c. 18, (Westminster 2), enacted that when a debt was recovered or acknowledged, or damages awarded

[a] 3 Co. 11.

in the King's Courts, it should be in the election of the creditor to have a writ of *fieri facias*, or to have delivered to him all the chattels of the debtor (saving only his oxen and beasts of the plough) and the *one half* of his land, until the debt should be levied upon a reasonable price or extent.

In pursuance of this statute a writ of execution was framed, called a writ of *elegit*, from the words of the entry on the rolls, *Quod elegit sibi executionem fieri de omnibus catallis et medietate terræ.* On the suing out of this writ, the sheriff was to impannel a jury to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and to make the same inquiry as to his real property, and upon such inquisition to deliver all the goods and chattels, and a moiety of the lands, to the plaintiff, by metes and bounds, at the appraised value.

The inquisition must find the lands with certainty, their value, the place and county where they lie, where the inquisition is taken, and the estate the defendant has in them, whether he is seised in severalty, or as joint-tenant, or tenant in common.[b]

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[b] 1 Arch. Prac. by Chitty, 445.

If the goods and chattels of the debtor are sufficient to satisfy the debt, the lands ought not to be extended.[c] If, however, the goods and chattels are insufficient for this purpose, the sheriff must deliver execution of the lands to the plaintiff after the jury have found their value, and return the writ, that the inquisition may be recorded in the Court out of which the *elegit* issued.[d] But the sheriff delivers only *legal* possession, the creditor being left to take *actual* possession under his *elegit*; or, if prevented from taking possession by entry, to proceed by ejectment,[e] in which he must produce an examined copy of the judgment roll containing the award of the *elegit*, and the return of the inquisition.[f]

Although the plaintiff in possession under his *elegit* is said to hold the land *ut liberum tenementum*, he, in fact, acquires no freehold, but only a chattel interest, which devolves on his personal representatives.[g]

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[c] 2 Inst. 395.

[d] Dyer, 100; 3 Bac. Abr. 379.

[e] 3 Term. Rep. 295; *Rogers* v. *Pitcher*, 6 Taun. 202; 2 Saund. Rep. 69 *c*, n. 3.

[f] *Ramsbottom* v. *Buckhurst*, 2 M. & S. 567.

[g] 2 Inst. 396; Co. Litt. 42 *a*; 2 Bla. Com. 161.

The lands were delivered to the creditor, until the amount of the debt, and stated damages, had been received;[h] and as the annual value of the land is estimated according to the inquisition and extent, the time when the debt, &c. would be satisfied was certain, and the creditor might recover possession without any *scire facias*.[i] The lands, however, are generally extended at much below their actual value;[k] and therefore, if the creditor could shew that by some casual profit the judgment debt, &c. had been satisfied before the expiration of the time, he might thereupon recover possession by means of a *scire facias*.[l]

With reference to the creditor's remedies, it is immaterial whether the judgment was obtained in an action resisted, or was the result of previous arrangement between the parties. The words of the Statute of Westminster are "recovered or knowledged in the King's Courts," and the second expression has given rise to the common practice of debtors confessing judgments under warrants of attorney given for that purpose. Be-

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[h] *Fleetwood's case*, 4 Rep. 67.

[i] 2 Inst. 396.

[k] *Earl of Bath* v. *Earl of Bradford*, 2 Ves. sen. 589.

[l] 4 Rep. 67.

tween such judgments and a judgment obtained in an action resisted, Lord *Kenyon*, in *Doe* v. *Carter*,[m] said that he saw no difference, since the latter was merely to shorten the process, and to lessen the expense of the proceedings.

Before the plaintiff can take out execution on a judgment which has been signed more than a year and a day, the formality of a writ of *scire facias* is generally required that the defendant, receiving notice of the intended execution, may shew that the judgment has been already executed, or other cause, if he can, why execution should not issue against him.[n] By R. H. 2 W. 4, r. 79, this writ cannot be obtained after *ten* years without a motion for that purpose in term, or a judge's order in vacation; nor, if more than *fifteen*, without a rule to shew cause. But if the plaintiff have been prevented from suing out execution by a writ of error[o] or injunction,[p] or by having the judgment

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[m] 8 Term. Rep. 61.

[n] 2 Inst. 469; 3 Bac. Abr. 407; *Heath* v. *Brindley*, 2 Ad. & Ell. 368.

[o] *Winter* v. *Lightbound*, 1 Str. 301; *Adams* v. *Savage*, 3 Salk. 321; *Withers* v. *Harris*, 2 Lord Raym. 807.

[p] 2 Burr. 660; 6 Moore, 517; *Hiscocks* v. *Kemp*, 5 Nev. & M. 118. But see 1 Str. 301; 1 Salk. 322; *Hodson* v. *Earl of Warrington*, 3 P. Wms. 36; 3 Bac. Abr. 409.

with a *cesset executio* for a term,[q] the year and day do not begin to run until the removal of the particular impediment.

In *Morris* v. *Jones*,[r] it was decided that the debtor might, *by his agreement*, dispense with the necessity of the plaintiff reviving his judgment before execution, but some doubt has been thrown on this decision by the case of *Heath* v. *Brindley*.[s]

Under the term "land" in the statute, the freehold estates and interests which the debtor held in severalty, in coparcenary, or in common,[t] rent-charges,[u] lands held in ancient demesne,[x] and estates granted by the crown for the maintenance of dignities,[y] were liable to be extended. And it would seem that impropriate tithes might be taken under an *elegit*, as they are said to have all the properties of temporal inheritances.[z]

If the property is a reversion expectant upon a lease for lives or for years, and the reversioner is entitled to a rent in respect of the lease, the cre-

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[q] *Booth* v. *Booth*, 6 Mod. 288; *Dillon* v. *Browne*, 6 Mod. 14; 7 Mod. 64; 5 Nev. & M. 113.

[r] 2 B. & C. 242.

[s] 2 Ad. & El. 368.

[t] Cru. Dig. 54.

[u] Moore, 32.

[x] 2 Inst. 397; *Cox* v. *Barnsby*, Hob. 47.

[y] *Davis* v. *Duke of Marlborough*, 2 Swanst. 136.

[z] Co Litt. 159.

ditor might extend a moiety of the reversion, and a moiety of the rent.[a]

An estate in joint-tenancy could not be extended after the death of the joint-tenant who acknowledged the judgment.

Copyholds not being expressly mentioned in the statute, could not be taken under an *elegit*, for the lord could not have a tenant forced upon him without his consent ;[b] and a term for years of copyhold lands made by license of the lord was equally exempt from execution.[c] Neither does the statute apply to advowsons in gross, for they are incapable of division, and cannot be valued at any certain rent ;[d] nor to the glebe land belonging to the parsonage or vicarage ;[e] nor to rents seck.[f]

It is said that the lands of a bishop may be taken under an *elegit*.[g]

An estate tail could not be extended so as to affect the issue in tail, but only for the life of the tenant in possession ;[h] and the lands of the wife

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[a] 1 Roll. Abr. 894 ; Gilb. Execut. 38, 39. [b] 3 Co. 9.
[c] 1 Roll. Abr. 888. But see 1 Scriven on Copyds. p. 548.
[d] 3 Bac. Abr. 382. But see 3 P. Wms. 401.
[e] Jenk. 207. [f] Cro. Eliz. 656.
[g] 3 Bac. Abr. 383.
[h] *Ashburnham* v. *St. John*, Cro. Jac. 85.

could only be extended for her husband's debts, during the coverture; or, where he was tenant by the curtesy, for his own life.[i]

Upon a writ of *elegit* the sheriff might either deliver a moiety of a term of years to the plaintiff, as part of the lands and tenements of the debtor, or sell the whole term, as part of his personal estate, to the plaintiff at a gross sum, appraised and settled by a jury.[j] If the defendant tenders the money at the time of the appraisement, and before the delivery of the term, or even afterwards in court, the term may be saved. But if no such tender is made, the property in the term is altered by the delivery of the sheriff, and the plaintiff may either keep, or dispose of it, without being accountable for the profits.[k]

It has been decided that the plaintiff in execution may purchase a term of years sold under a writ of *fieri facias*, for the sale is made by the sheriff, and not by the creditor.[l]

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[i] 3 Bac. Abr. 383.

[j] 8 Co. 171; 3 Bac. Abr. 380; *Doe* v. *Evans*, 1 Cr. & Mees. 459.

[k] Gilb. Execut. 34; 2 Saund Rep. 68, f. n, 1; *Comyn* v. *Bradlyn*, Moor. 873.

[l] *Stratford* v. *Twynam*, 1 Jac. 418.

By means of the statute already referred to, a judgment became a general lien upon all the lands which the debtor had at the time of entering up the judgment, and upon all those which he subsequently acquired; and no subsequent act of the debtor's, not even an alienation for a valuable consideration without notice, could avoid it.[m]

When a creditor obtained two judgments of different terms, he was entitled on the one judgment to extend one moiety of the debtor's lands, and on the other judgment, a moiety of that which remained after the first extent.[n] But a plaintiff obtaining two judgments of the same term, could by suing out two *elegits* at the same time, take the entirety in execution.[o] And it has been decided that when two *elegits* are issued at the same time upon judgments signed in the same term, the sheriff might extend on each an entire moiety of the defendant's land, though the judgments were at the suit of different plaintiffs.[p]

By a fiction of law the whole term is con-

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[m] 2 Cru. Dig. 49.
[n] *Huit* v. *Cogan*, Cro. Eliz. 482.
[o] *Attorney General* v. *Andrew*, Hard. 23.
[p] *Doe* v. *Creed*, 3 Bing. Rep. 327.

sidered, for many purposes, as but one day; and therefore all judgments related to the first day of the term, in which they had been given or acknowledged. To remedy the injury which resulted from this doctrine to purchasers, who were often, in consequence, affected by judgments obtained after their conveyances had been executed, it was enacted by the 14th and 15th sections of the Statute of Frauds,[p] that any judge or officer of any of his Majesty's Courts at Westminster that should sign any judgments, should, at the signing of the same, without fee, set down the day of the month and year of his so doing, and that such judgments should operate as against purchasers *bond fide* for valuable consideration, only from such time as they should be signed.

This provision—that judgments should only bind lands from the signing—relates only to purchasers for value without notice,[q] and therefore, as between creditors, a judgment entered in the vacation, related to the first day of the preceding term.[r] But now by a statutory rule of all the Courts of

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[p] 29 Car. 2, c. 35.

[q] *Leahy* v *Dancer*, 1 Molloy, 313.

[r] *Robinson* v. *Tonge*, 3 P. Wms. 398.

H. T. 4 W. IV. r. 3, all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day. Provided that it shall be competent for the court, or a judge, to order a judgment to be entered *nunc pro tunc.*

The 16th section of the Statute of Frauds enacts that no writ of *fieri facias*, or other writ of execution, shall bind the property of the *goods* of the person against whom such writ of execution may be sued forth but from the time that such writ shall be delivered to the sheriff, undersheriff, or coroners, to be executed, and that such time is to be endorsed upon the writ.

The term "goods" in this section, comprehends chattel interests in land; and as between different creditors, he whose writ is first delivered to the sheriff, is entitled to priority.[s]

In *Shirley* v. *Watts*,[t] the Master of the Rolls said, "till execution, the plaintiff has no lien on the leasehold estate;" and in *Forth* v. *Duke of Norfolk*,[u] Sir *John Leach*, V. C., observed, that

[s] *Hutchinson* v. *Johnston*, 1 Term Rep. 729.

[t] 3 Atk. 200.; and see *Burdon* v. *Kennedy*, 3 Atk. 739.

[u] 4 Mad 506.

a judgment is, at law, no lien upon a legal term, and when the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding the judgment, the debtor could well assign his legal term at his pleasure.

It has been a common practice to keep on foot long terms of years, after the original purposes of their creation may have been satisfied, and on every sale of the inheritance to assign them to a trustee, for the purchaser's protection. Where the term was merely attendant, a judgment was, from the period of its being entered up, a lien upon the equitable beneficial interest as a part of the inheritance; but a purchaser could, by obtaining an assignment of the outstanding legal interest for his benefit before execution, protect himself from judgments entered up after the creation of the term, provided he bought without notice of the subsisting incumbrances. As, however, a judgment creditor could not be affected by an outstanding term which was created subsequently to his lien, and judgments entered up after the creation of the term were an immediate incumbrance upon the reversion, it was important to ascertain that the term was old enough in its creation, and had a sufficiently long period to run.

to afford the purchaser the protection he required; and it was also necessary to see that the term had not been so neglected as to raise a presumption that it had been previously surrendered.[w]

In consequence of the difficulty of obtaining execution against any portion of the property of the judgment debtor, of which he was merely the equitable owner, the 10th section of the Statute of Frauds empowers every sheriff, officer, &c. to make and deliver execution of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons should be seised or possessed of in trust for him against whom execution is so sued, like as if the said party against whom execution should be sued had been seised of such lands, &c. of such estate as they be seised in trust for him *at the time of the said execution sued.*

A mere equitable interest in a term of years has been held not to be within the statute. In the case of *Scott* v. *Scholey*,[x] Lord *Ellenborough* said, "The very silence of the Statute of Frauds,—

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[w] 3 Sug. V. & P. 25, s. 23

[x] 8 East, 467.; and see *Metcalf* v. *Scholey*, 2 Bos. & Pul. 461.

which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, — affords a strong argument that those interests were meant to continue in the same situation and plight in respect of executions, in which both freehold and leasehold trust interests equally stood prior to the passing of that statute." But in *Doe* v. *Evans*,[y] Mr. Baron *Bayley* thought that an outstanding term, vested in a trustee upon trust to attend the inheritance, was liable to be seized under an execution against the *cestui que trust*, the owner of the inheritance.

Neither could any trust estate be taken in execution under the Statute of Frauds, but such as the debtor had at the time of execution sued,

In *Hunt* v. *Coles*,[z] it was said that the words *at the time of the said execution sued*, refer to the seisin of the trustee; and therefore, if the trustee had conveyed the lands before the execution sued, though he was seised in trust for the defendant at

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y 1 Cr. & Mees. 450.

z Com. Rep. 226.

the time of the judgment, the lands could not be taken in execution.

As a judgment was not a lien on the legal estate of the trustee until the writ was lodged in the sheriff's office, a purchaser for a valuable consideration *without notice*, having equal equity with the judgment creditor, was able to protect himself by getting in the legal estate at any time before that period.[a]

But if a person purchased an equitable estate, with notice of existing judgments upon the property, no acquisition of the legal estate by the purchaser could protect him from such incumbrances.[b] If therefore a mortgagee, seised of the legal estate, purchased the equity of redemption, he was bound by the judgments, of which he had notice, although they were entered up subsequently to the mortgage.[c]

It has also been decided, that the Statute of Frauds does not extend to equities of redemp-

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[a] *Churchill* v. *Grove*, Nels. Ch. Rep. 91; 1 Saund. Us. 275.

[b] *Tunstall* v. *Trappes*, 3 Sim. 286.

[c] 3 Sim. 286; 2 Sugd. Vend. & Pur., 385, 10th. edit.

tion,[d] nor to any equitable estate of the debtor in which he has not the sole beneficial interest.[e]

In connection with this part of the subject, it is to be observed, that where property was agreed to be sold, a purchaser, for an adequate consideration, was relieved in equity from judgments entered up against the vendor subsequently to his contract, although the conveyance might not have been executed. In the words of Sir *L. Shadwell*, "From the time *H. A. S.* entered into binding contracts to sell his estates to purchasers, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed; and if he had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them."[f]

If, however, the judgment is entered up, and the purchaser has notice of it before the payment of

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[d] *Burdon* v. *Kennedy*, 3 Atk. 739; *Lyster* v. *Dolland*, 3 B. C. C. 478.

[e] *Doe* v. *Greenhill*, 4 Barn. & Ald. 684; *Harris* v. *Booker*, 4 Bing. 96.

[f] *Lodge* v. *Lysely*, 4 Sim. 75; See also *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 282; Lewin on Trusts, 537.; *Whitworth* v. *Gaugain*, *infra*.

the purchase money, it does not appear to be clearly settled what would be the effect of the judgment with reference to the land included in the contract. In *Finch* v. *Earl of Winchelsea*,[g] Lord Chancellor *Cowper* said, "Articles made for a valuable consideration, *and the money paid*, will, in equity, bind the estate, and prevail against any judgment creditor mesne betwixt the articles and the conveyance." In *Forth* v. *Duke of Norfolk*,[h] a person mortgaged an estate in fee, and then entered into a contract for sale. The vendor subsequently confessed a judgment, and afterwards conveyed the estate to the purchaser; but a part of the purchase money not being paid at the time, the same was secured to the vendor by a mortgage term created by the deed of conveyance. After the conveyance, notice was given by the plaintiff of his judgment, the money secured to the vendor by the mortgage term being then unpaid. Sir *J. Leach* observed, "Every assignee for a valuable consideration will hold the equitable interest discharged of the claim of the judgment creditor, unless he has notice of it before his consideration

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[g] 1 P. Wms. 282. [h] 4 Mad. 503

is paid. If before the conveyance the purchaser had received notice of the judgment, he being then a purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase money, would have been equally affected with the judgment debt as the debtor himself. If he afterwards paid the whole purchase money to the debtor, he would still have remained liable to the judgment creditor."

Now real estate undergoes a constructive conversion in equity, from the date of the contract for sale. The vendor is from that moment a trustee of the land for the purchaser, who is equally a trustee of the purchase money for the vendor. With respect, therefore, to land which is subject to a binding contract for sale, it is certainly more consistent with principle to hold that a subsequent judgment against the vendor would be no incumbrance in equity, except in the event of the purchase money being unpaid, and the contract being abandoned.

The judgment is, however, considered a lien upon the unpaid part of the purchase money, and therefore a purchaser, with notice of the lien, would be unsafe in paying over what remained in his hands to the vendor, without having the judg-

ment discharged, or obtaining an indemnity from the judgment creditor.[1]

In *Lodge* v. *Lyseley*,[j] a father, tenant for life, with remainder to his son in tail, joined with his son in suffering a recovery of and conveying the estates to trustees in trust to sell, and to pay 30,000*l.* to the father, and the residue to the son, and it was declared that the receipts of the trustees should be sufficient discharges. The trustees entered into a contract for the sale of the estates, and afterwards judgments were entered up against the father. The purchaser objected to the title, on the ground that the judgments formed a lien on the estate; but the Vice Chancellor overruled the objection, observing, "that by the conveyance to which the father and son were parties, the son acquired a clear right in equity to have the trusts expressed in the conveyance performed, because he amalgamated his remainder in tail with the father's life estate, and it was agreed between them that there should be an immediate sale of the whole, and a division made of the purchase-money. Part was to be applied in payment of the father's debts, and 30,000*l.* was then to be paid

[1] 3 Prest. Abst. 329. [j] 4 Sim. 75.

to the father, and the clear residue to be paid to the son; therefore, as soon as the conveyance was executed, the son had a clear right to file a bill against the father and the trustees, for a sale according to the trusts expressed: and, inasmuch as part of the trust is that the trustees should sell and give releases to the purchasers, there could be no execution of the trusts without allowing the trustees to receive the money and give their receipts, which were to discharge the purchaser."

And in a case[1] where a father conveyed real estates to trustees, upon trust to sell, and repurchase annuities granted by his son, and pay the son's debts at their discretion, and, subject thereto, upon trust for the father for life, with remainder to his son in fee, an annuitant, mentioned in a schedule to the deed, and stated to have entered up and docketed a judgment against the son, upon a warrant of attorney which accompanied his security, was held to have no lien by virtue of his judgment upon the produce of the trust estates in the hands of a purchaser: Sir *John Leach*, M. R., said, "The petitioner, and the other scheduled judgment creditors, had no legal lien upon

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[1] *Foster* v. *Blackstone*, 1 Myl. & K. 297.

the trust estates, but they had a possible equitable lien, depending upon a contingency. The trustees had a full authority to sell, and convert the realty into personalty. If any part had been unsold by the trustees, it would have remained land, and the judgment would have attached upon it; but it was all sold by the trustees and converted into personalty, and the contingency, which would have entitled the judgment creditor, never took effect."

But it is probable that a judgment entered up against the grantor, after a conveyance upon trust for sale, would be considered a charge upon such of the proceeds of the sale in the hands of the trustees as should be payable to him.[k]

In addition to the legal remedy provided by the statute of Westminster, a judgment, from the period of its being entered up, constituted an equitable lien on the lands of the debtor; so that if there was some legal impediment to prevent the judgment creditor from taking them in execution under either of the statutes which have been referred to, equity, fastening upon the debtor's actual beneficial interest would frequently lend its as-

[k] 2 Sugd. V. & Pur., p. 388., 10th edit.

sistance, to give the creditor, by its own process, the benefit which he would have had at law if no such impediment had intervened.

In *Forth* v. *Duke of Norfolk*,[1] Sir *John Leach* observed, "A judgment creditor has at law, by the Statute of Frauds, execution against the equitable freehold estate of the debtor in the hands of his trustees, provided the debtor has the whole beneficial interest; but if he has a partial interest only in his equitable freehold estate left, the judgment creditor has no execution at law, though he may come into a court of equity, and claim there the same satisfaction out of the equitable interest as he would be entitled to at law, if it were legal. Every voluntary assignee of the equitable interest of the debtor, will be in the same situation with respect to the claim of the judgment creditor as was the debtor himself. Every assignee for valuable consideration will hold the equitable interest, discharged of the claim of the judgment creditor, unless he has notice of it before his consideration is paid."

In *Plaskett* v. *Dillon*,[m] Lord Dillon demised

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[1] 4 Madd. 504.; and see *Lewis* v. *Lord Zouche*, 2 Sim. 389.
[m] 1 Hog. 328.

certain estates, of which he was tenant for life, to trustees for ninety-nine years, if he should so long live, in trust out of the rents and profits to discharge certain incumbrances, and, subject thereto, to pay to himself a rent-charge of 5000*l.* for his life, and to apply the surplus in the payment of interest on, and in the gradual extinction of the capital of, his debts. A judgment was afterwards entered up against him, and the judgment creditor sued out his *elegit*, but there being no means of obtaining possession of the rent-charge on account of the impediments to proceeding at law, he filed his bill to attach it in equity. Sir *William M'Mahon* said "The rule of law is, that the freehold property of the debtor shall be liable to the demands of his judgment creditors. Lord Dillon says that this deed shall put the freehold out of the reach of his creditors, both at law and in equity, or, in other words, that by a voluntary deed he may screen his property from his creditors, and yet retain the benefit of it for himself. Was the annuity payable out of dividends of stock, the question would be different, because the stock is not at law liable to an execution; but the land was liable to an execution before the deed was executed, and would have continued so only for that deed. Lord Dillon reserves a portion of the

rents to himself, and insists that the magical operation of a voluntary deed shall clear it from all incumbrances. If the Statute of Uses had executed the trusts of this deed, Lord Dillon's interest would have been extendible, and the interposition of a trust cannot exempt it in this court. There is a portion of Lord Dillon's estates beneficially vested in him, and therefore I think the plaintiff's claim to the assistance of this court is good." This decision was afterwards affirmed on appeal by Lord *Manners*, and afterwards, on a further appeal, by the House of Lords.[n]

Equity would assist a judgment creditor by allowing him to redeem a subsisting mortgage,[o] by appointing a receiver,[p] or by paying off the judgment, or giving him his legal priority, where, under any circumstances, the lands of the debtor were being sold by the Court, or became subject to administration.[q].

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n 2 B. N. R. 239.

o *Tunstall* v. *Trappes*, 3 Sim. 300; *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538.

p *Silver* v. *Bishop of Norwich*, 3 Swanst. 112. n.; *White* v. *Bishop of Peterborough*, 3 Swanst. 109.; 1 Hog. 328; *Metcalfe* v. *Archbishop of York*, 2 Myl. & Cr. 547.

q *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 416.

But as a judgment was no lien, at law or in equity, upon a chattel interest in land *until execution*, the creditor was not entitled to redeem a mortgage of such an interest, until he had sued out his writ.[r]

A judgment creditor could not tack his judgment to a prior legal mortgage, to the prejudice of a mesne incumbrance. In *Brace* v. *Duchess of Marlborough*,[s] a judgment creditor bought in the first mortgage, without notice of the second mortgage, when he lent his money on the judgment, and the question was, whether he could tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne incumbrance. Sir *J. Jekyll* said, "If a judgment creditor buys in the first mortgage, he shall not tack, or unite, this to his judgment, and thereby gain a preference, for one cannot call a judgment creditor a purchaser, nor has such a creditor any right to the land; he has neither *jus in re*, nor *ad rem*, and, therefore, though he releases all his right in the land, he may extend it afterwards.

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[r] *Shirley* v. *Watts*, 3 Atk. 200.

[s] 2 P. Wms. 490.

[s] 2 P. Wms. 490.

All that he has by the judgment, is a lien upon the land, but *non constat* whether he will ever make use thereof, for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the body, and then, during the defendant's life, he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased may be extended on the judgment. Nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded or deceived, if the mortgagor, before that time, mortgaged his land to another, and it is such a fraud as the parliament[t] takes notice of, and punishes by foreclosing such mortgagor, who mortgages his land a second time without giving notice of the first mortgage; and in that respect this case differs from a puisne mortgagee's buying in the first mortgage."

But it is laid down by Sir *J. Jekyll*, in the above case, that if a mortgagee, without notice of the *mesne* incumbrance, lends a further sum to the mort-

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[t] See 4 & 5 Wm. & Mary, c. 16.

gagor upon a judgment, he shall retain as against the *mesne* incumbrance till both the mortgage and judgment debts are paid: because it was to be presumed that he lent his money upon the judgment, as knowing he had a hold of the land by the mortgage, and in confidence ventured a further sum on a security which, though it passed no present interest in the land, must be admitted to be a lien thereon.

If a judgment creditor advances money to his debtor upon mortgage, without notice of an intervening judgment, he is entitled to hold the mortgaged estates against the creditor upon the second judgment, until the principal and interest, as well of the mortgage as of the prior judgment, are paid.[u]

So also in a case[v] where *S.* granted a rent charge of 300*l.* for 2000*l.*, to the plaintiff, and afterwards mortgaged the premises for 1,200*l.* to *C.*, whose representatives bought in a judgment precedent to the grant of the rent charge; there *C.*, having no notice of the rent charge, when he lent his money upon the mortgage, it was decreed that his representatives were entitled to hold as against the

[u] *Smithson* v. *Thompson*, 1 Atk. 520.
[v] *Higgon* v. *Syddal*, 1 Ch. Cases, 149.

grantee of the rent charge until payment of what was due to them upon the judgment and mortgage.

As copyholds were not extendible under the Statute of Westminster, a mortgagee of copyholds could not tack a judgment to his mortgage.[w]

A judgment creditor might apply to a Court of Equity, after the death of the debtor, for the administration of his assets; but he did not acquire such a lien, by virtue of his judgment, as would entitle him in equity to a sale in the lifetime of the debtor.[x]

As the judgment creditor derived his right against the debtor's lands from the statute, equity could only follow the law; and consequently in seeking the assistance of a court of equity, the creditor was confined to the moiety which might have been taken in execution under the statute if there had been no legal impediment.

Thus, in *Stileman* v. *Ashdown*,[y] Lord *Hardwicke*

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w *Cannon* v. *Pack*, 6 Vin. Abr. 222. pl. 6.

x 3 Myl. & Cr. 416.

y 2 Atk. 608.; and see *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137; *O'Fallon* v. *Dillon*, 2 Sch. & Lef. 24; *Rowe* v. *Bant*, Dick. 150.

said, " Equity follows the law in this case; and as the plaintiff can extend only a moiety there, he shall have no more here. Suppose it was the case of a bond creditor, he might have an action of debt against the heir, and judgment against him upon assets descended; and this he is entitled to at common law, for it is the debt of the heir, and the action is in the *debet* and *detinet;* but if a judgment was obtained against the ancestor, a *scire facias* could not be brought against the heir, because at common law, the heir was not bound. There is no doubt but, if it had continued a bond, the whole assets would have been liable in the hands of the heir; but before the Statute of Westminster, there was no remedy against the ancestor in his lifetime upon a judgment *on his land,* and it is that statute which subjects one moiety thereof to the judgment. The consequence of that is, that, notwithstanding the ancestor is dead, if the land comes into the hands of the heir or purchaser, it comes equally bound. In what right, then, is the *scire facias* brought against the heir or purchaser? Why, only as terre-tenant, and by virtue of the statute. I thought of the objection myself, that a bond creditor would be in a better situation than a judgment creditor, and so he is;

for so soon as the bond debt is turned into a judgment, it is extinct against the ancestor, and the creditor cannot in the lifetime of the ancestor bring any action on the bond; can he then bring any action against the heir after it is entirely extinct? If this is the case at law, what is there in equity to better his case? Why, nothing more than to accelerate the payment, by directing a sale of the moiety, and not let the judgment creditor wait till he has been paid out of the rents and profits, but equity cannot change the rights of the parties."

If, however, a judgment creditor had redeemed a subsisting mortgage, he being obliged to redeem the whole, was entitled to have the entirety of the lands comprised in the mortgage sold for the satisfaction of his debt.[y] And he could also go against the *entirety* where the lands were being sold under the direction of the Court, and were at the same time subject to a subsisting mortgage which he was entitled to redeem.[z]

As a general rule, the Court would suspend its

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y *Stonehewer* v. *Thompson*, 2 Atk 440.

z *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538; *Tunstall* v. *Trapes*, 3 Sim 300.

relief until the judgment creditor had sued out his *elegit;* and his bill was demurrable if it contained no allegation that he had done so. But it was unnecessary for the creditor to procure a return of the writ.[a]

In *Neate* v. *The Duke of Marlborough*[b] a judgment creditor filed his bill, praying that he might be declared entitled to an equitable lien upon an annual sum of 3000*l.* which was payable to the debtor out of certain freehold estates; a demurrer to the bill was allowed on the ground that it contained no allegation that the creditor had sued out his *elegit.* In this case Lord *Cottenham* observed, "How can the judgment which, *per se,* gives the creditor no title against the land, be considered as giving him a title here? Suppose he never sues out the writ, and never, therefore, exercises his option, is this Court to give him the benefit of a lien to which he has never chosen to assert his right? The reasoning would seem very strong that as this Court is lending its aid to the legal right, the party must have previously armed

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[a] 3 Myl. & Cr. 407; Red. Pl. 126, 4th edit.

[b] 3 Myl. & Cr. 407.

himself with that which constitutes his legal right; and that which constitutes his legal right is the writ. This Court, in fact, is doing neither more nor less than giving him, what the act of parliament and an ejectment would, under other circumstances, have given him at law. The sole reason for coming into this court being founded on a right which the writ of *elegit* confers, the creditor cannot come without having obtained that right."

But where an application was made, after the death of the debtor, for the administration of his assets,[c] or from any other circumstances, a sale had become indispensable, the court would satisfy the demand of the judgment creditor without requiring him to sue out an *elegit*.[d]

Where property is conveyed to such uses as *A. B.* shall appoint, with a limitation to himself in fee, in default of appointment, and *A. B.* afterwards exercises his power, the appointment divests his ulterior estate, and the appointee claims immediately under the instrument by which the

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[c] *Barnewall* v. *Barnewall*, 3 Ridg. Parl. Rep. 61.

[d] *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 416; *Tunstall* v. *Trappes*, 3 Sim. 286.

power is limited. Upon this principle the appointee was unaffected by any judgment which was entered up against the donee of the power between the creation of such power and the appointment.

Thus, in *Doe* d. *Wigan* v. *Jones*,[e] Lord *Tenterden*, C. J., said, "It has been established ever since the time of Lord *Coke*, that where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding *in invitum*, and therefore falls within the rule."

And in cases of this kind notice was immaterial.[f]

If the debtor became a bankrupt, a cre-

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[e] 10 Barn. & Cres. 459. See also *Tunstall* v. *Trappes*, 3 Sim. 300.

[f] *Eaton* v. *Sanxter*, 6 Sim. 517; *Skeeles* v. *Shearley*, 8 Sim. 153; on appeal 3 Myl. & Cr. 112.

ditor with an unexecuted judgment was deprived of the benefit of his security as against the assignees; for by the st. 6 Geo. 4, c. 16, s. 108, it is enacted that no creditor having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of an execution or extent served and levied by seizure upon, or any mortgage, or lien, upon any part of the property of the bankrupt before the bankruptcy;[h] and *it is provided* that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall be paid otherwise than rateably with other creditors.

The provision in the above section does not extend to an execution founded on a judgment on a warrant of attorney, when the goods have been sold, and the produce of the sale paid over to the creditor, before the act of bankruptcy.

In *Wymer* v. *Kemble*,[i] *A.*, having entered up a judgment against *B.*, under a warrant of attorney, took out execution, and on the same day the sheriff levied on *B.*'s goods, and having caused

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[h] *Barker* v. *Goodair*, 11 Ves. 84.

[i] 6 B. & C. 479; see also *Taylor* v. *Taylor*, 5 B. &. C. 392.

them to be duly appraised, bargained and sold them to *A.*, and on the same day delivered possession of them to him. *B.* having soon afterwards become bankrupt, his assignees took possession of the goods, and sold them: it was held in an action of trover, brought by the creditor against the assignees, that *A.* was not a "creditor having security" for his debt within the statute 6 G. 4, c. 16, s. 108, the seizure and sale having been perfect and complete before the act of bankruptcy, and that he was therefore entitled to recover.

In *Morland* v. *Pellatt*,[k] judgment was entered up on a warrant of attorney given by two joint traders, and a *fi. fa.* issued against them, returnable on the 2nd of May. Their goods were seized on the 7th of March, but not sold, they making payments to the officer of the sheriff from time to time; and on the 1st of May, the officer received from the defendants the money directed to be levied. On the 2nd of May, one of them committed an act of bankruptcy, and the other on the 5th. On the 12th of May, a commission of bankrupt issued against them, and on the 19th the

[k] 8 B. & C. 722.

sheriff paid over the money to the execution creditor. In an action by the assignees, it was held that the creditor was entitled to retain the money, not being a creditor having security at the time of the bankruptcy.

But in a case where an act of bankruptcy was committed before the sale, it was held that the sheriff having notice of the bankruptcy was not justified in paying over the proceeds to the execution creditor, and was liable on paying it over to him to be sued by the assignees in an action for money had and received.[1] It is questionable, from what fell from the judge in *Notley* v. *Buck*, whether the sheriff was justified in selling the goods at all after notice of the bankruptcy.[m]

If the goods and chattels seized under the execution are sold before the bankruptcy, the circumstance of the debtor committing an act of bankruptcy before the return day of the writ is immaterial.[n]

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[1] *Notley* v. *Buck*, 8 B, & C. 160 ; and see *In re Washbourne*, 8 B. & C. 444.

[m] See 1 Bing, N. Cases, 721.

[n] *Higgins* v. *M'c Adam*, 3 Y. & Jer. 1.

The above provision in the 108th section, has been materially modified by the statute 1 Wm. 4, c. 7, s. 7, which recites the provision, and enacts that no judgment signed, or execution issued on a *cognovit actionem*, signed after declaration filed or delivered, or judgment by default, confession or *nihil dicit*, according to the practice of the court, in any action commenced adversely, and not by collusion for the purpose of fradulent preference, shall be taken to be within the provision of the said recited act.

Judgments upon warrants of attorney, though given without collusion, or intention of fraudulent preference, are not within the protection of this statute.[o] But the 81st sect. of the 6 Geo. 4, c. 16, provides that all executions, *bond fide* executed, or levied more than two calendar months before the issuing of the commission, shall be valid, notwithstanding a prior act of bankruptcy, provided the person or persons on whose account execution shall have issued, had not at the time of executing or levying such execution, notice of any prior act of bankruptcy. This section protects *all* execu-

[o] *Crossfield* v. *Stanley*, 4 B & Ad. 87.

tions *bonâ fide* levied by seizure more than two months before the commission, whether founded on judgments after verdict, or on judgments by confession, the 108th section applying only to such executions as are not within the protection of the 81st section.[p] And now the statute 2 & 3 Vict., c. 29, s. 1, provides that all executions *bonâ fide* executed or levied before the date and issuing of the fiat shall be valid notwithstanding a prior act of bankruptcy, provided the person or persons on whose account such execution shall have been issued, had not at the time of executing and levying the execution notice of a prior act of bankruptcy, yet so that nothing therein contained should give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit, given by any bankrupt, by way of fraudulent preference.

Executions founded on judgments on warrants of attorney, have been held to be within the pro-

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[p] *Godson* v. *Sanctuary*, 4 B. & Adol. 255.

tection of this statute, only where the seizure *and sale* have been perfect and complete before the issuing of the fiat.[q]

It should seem that no execution on lands levied under a writ of elegit, whether founded on a judgment on a warrant of attorney, or after verdict, could be avoided in any instance where possession has been delivered to the plaintiff before the bankruptcy of the debtor:[r] and assuming this to be the case, all executions would be good by virtue of the statute 2 & 3 Vict. c. 29, s. 1, as against a previous bankruptcy, if possession was delivered to the plaintiff *bond fide* and without notice before the date and issuing of the fiat.

Upon the construction of the 21 Jac. 1, c. 19, s. 9, (of which the 6 Geo. 4, c. 16, s. 108, is almost a re-enactment) it has been decided that the bankruptcy of the debtor would not deprive the judgment creditor of his lien upon the lands which had been sold between the judgment and the bankruptcy; and though the creditor could not come in upon the bankrupt's estate for any more

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[q] *Whitmore* v. *Robertson*, 8 M. & W. 463.

[r] Bac. Abr. Execut. D; Tidd's Prac. 9th edit. 996.

than his proportion with the other creditors, yet that he might extend his judgment against a purchaser, who bought the land prior to the bankruptcy.[s]

In *Sloper* v. *Fish*,[t] the bankruptcy took place after the execution of the deeds of conveyance, but before the payment of the purchase money; and the question was, whether a judgment would be operative as against the lien of the assignees for the purchase money, or if not, what would prevent its attaching upon the estate, subject to the lien. Sir *W. Grant*, M. R., considered the point to be too doubtful to compel the purchaser to take the title.

In *Sharpe* v. *Roahde*,[u] Sir *W. Grant* held that judgment creditors had no lien upon lands articled to be sold before a bankruptcy, the conveyance of which remained unexecuted at the date of the bankruptcy.

But in a case[v] where there was a first and second mortgage, and the mortgagor became a bank-

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[s] *Orlebar* v. *Fletcher*, 1 P. Wms. 738; *Newland* v. ——, *id.* 91.

[t] 2 Ves. & Bea. 145.

[u] 2 Rose, 192.

[v] *Baker* v. *Harris*, 16 Ves. 397.

rupt, Sir *W. Grant* held that the first mortgagee was entitled to tack a subsequent docketed judgment, although no execution had issued at the time of the bankruptcy. He observed that the subsequent bankruptcy could not, in any degree, affect the mortgagee, who, before the bankruptcy, had a complete lien upon the land, as well for the judgment as the mortgage debt. The statute relates only to judgments, that continue merely such at the time of the bankruptcy, not to those which have acquired all the effect of an actual mortgage, as is the case of a judgment obtained by a party having an antecedent mortgage.

The statute 4 & 5 Will. & Mary, c. 20, (made perpetual by the 7 & 8 Will. 3, c. 36,) directs that the Clerk of the Essoigns of the Court of Common Pleas, the Clerk of the Dockets of the Court of King's Bench, and the Master of the Office of Pleas in the Court of Exchequer, should make and put into an alphabetical docket, by the defendant's names, a particular of all judgments entered in the said respective Courts of Michaelmas and Hilary terms, before the last day of the next ensuing terms, and of the judgments of Easter and Trinity Terms, before the last day of

Michaelmas term. And by the 3d section, it is enacted that no judgment, not docketed and entered in the books as aforesaid, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates.

With the exception of debts due to the crown, by record or specialty, or to which particular statutes give priority of payment, judgments are entitled to precedence over all simple contract and specialty debts. But in the administration of the testator's or intestate's estates, judgments which had not been docketed pursuant to this statute, were, at law and in equity, considered only has simple contract debts.[w] It was not, however, necessary that a judgment recovered against executors, upon a debt due from their testator, should be docketed in order to give preference against the

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[w] *Hickey* v. *Hayter*, 6 Term Rep. 384; *Hall* v. *Tapper*, 3 B. & Adol. 655; *Lanaʼs* v. *Fergusson*, 3 Rus. Ch. Ca. 349.

executors in the administration of the testator's estate.[x]

When the property is situate in either of the register counties, it becomes necessary to consider the Local Register Acts so far as they can affect the rights of the judgment creditor with respect to third persons.

The statute 5 Ann. c. 18, s. 4, enacts that no judgment shall bind any manors, lands, or hereditaments in the West Riding of the county of York, except from the time that a memorial thereof shall be entered at the Register Office of that riding; but the 11th section provides that if any judgment be registered within *thirty* days after the acknowledgment or signing thereof, all the lands that the defendant or cognizor had at the time of such acknowledgment or signing, shall be bound thereby.

And the statute 6 Ann. c. 35, ss. 19 & 28, contains similar enactments for the East Riding of the county of York, and for the town and county of the town of Kingston-upon-Hull.

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[x] *Gaunt* v. *Taylor* 20 Law Journal, C. P. 68.

By the statute 7 Ann. c. 20, s. 18, no judgment shall bind any manors, &c. in the county of Middlesex, except from the time that a memorial of such judgment shall be entered at the Register Office for that county.

By the statute 8 Geo. 2, c. 6, s. 1, judgments in the North Riding of the county of York shall be adjudged void, as against any subsequent purchaser or mortgagee for value, unless a memorial thereof be registered; but the 33rd section provides that if any judgment be registered within *twenty* days after the acknowledgment or signing thereof, all the lands that the defendant had at the time of such acknowledgment or signing shall be bound thereby; and that the registry of a memorial of such judgment, within the time aforesaid, shall be as available, to all intents and purposes, as if such memorial thereof had been entered in the said Register Office on the day of the signing or acknowledgment of such judgment.

Notwithstanding these enactments, their particular object being to secure subsequent purchasers and mortgagees against secret incumbrances, a purchaser, who bought with notice of any undocketed or unregistered judgment, was bound by it *in*

equity as completely as if the judgment had been docketed or registered within the period prescribed by the particular acts.[x]

But constructive notice—as a *lis pendens*—was not sufficient to make an undocketed or unregistered judgment binding upon a purchaser.[y] The notice must be *actual;* and notice to the agent of the purchaser in the same transaction is, for this purpose, regarded as actual notice to the purchaser himself.[z]

If a person purchases a portion of an estate which is subject to a judgment, and execution is sued out against the purchaser only, the debtor, his heir, and even purchasers of other portions of the land, are bound to contribute with him. But if execution is sued out against any portion of the lands which remain unsold, neither the debtor nor the heir will be entitled to contribution in respect of any part of the lands which are in the hands of

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[x] *Thomas* v. *Pledwell*, 7 Vin. Abr. 54; *Davis* v. *Earl of Strathmore*, 16 Ves. 419; *Le Neve* v. *Le Neve*, 3 Atk. 646.

[y] *Wyatt* v. *Barwell*, 19 Ves. 439.

[z] *Le Neve* v. *Le Neve*, 3 Atk. 646, 655; *Tunstall* v. *Trappes*, 3 Sim. 307.

a purchaser; and the amount of consideration is immaterial.[a]

Sir *Edward Coke* observes,[b] "where it is said in our books that if one purchaser only be extended for the whole debt, he shall have contribution, it is not thereby intended that the others shall give or allow him any thing by way of contribution; but it ought to be intended that the party who alone is extended for the whole, may, by *auditâ querelâ* or *scire facias*, as the case requires, defeat the execution, and thereby shall be restored to all the mesne profits, and compel the conusee to sue execution of the whole land. So, in this manner, every one shall be contributory; that is, the lands of every terretenant shall be equally extended."

With a view to remedy the hardship to which creditors were subject, of having their executions avoided if the extent omitted any portion of the land which was liable to the judgment, it was enacted by the 16 & 17 Car. 2, c. 5, s. 2, that where any judgment, statute, or recognizance,

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[a] *Sir W. Herbert's case*, 3 Co. 12 *b*; 2 Eq. Ca. Abr. 223.

[b] 3 Co. 14 *b*.

shall be extended, the same shall not be avoided or delayed by occasion that any part of the lands are or shall be omitted out of such extent: saving always to the party or parties whose lands shall be extended, his and their heirs, executors, and assigns, his and their remedy for contribution against such person or persons whose lands are or shall be omitted out of such extent from time to time.

But a purchaser has no right of contribution from purchasers of other portions of the estate of the debtor, if they derive title under a conveyance of earlier date.[b]

In *Averall* v. *Wade*,[c] a party seised of several estates, and indebted by judgment, settled one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledged judgments. The unsettled estates being insufficient to satisfy the judgments, two questions were raised; first, whether the judgments prior to the settlement should be thrown exclusively upon the settled estate, so as to leave the unsettled estates for the other judgment

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[b] See *Hartley* v. *Flaherty*, 1 Lloyd & Goold, 219; 5 Jarm. Byth, by Sweet, 61.

[c] 1 Lloyd & Goold, temp. Sugd. 252.

creditors; and secondly, if the settled estate should not be considered liable to exonerate the unsettled estates, for the benefit of the subsequent judgment creditors, whether they had a right to make the settled estate contribute to the payment of the prior judgments. Lord Chancellor *Sugden* held that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute.

If it be not absolutely essential, it is at least the proper course, to make all judgment creditors parties to a suit instituted for the foreclosure of any lands, on which the judgments are charges.

In *Bishop of Winchester* v. *Beavor*,[e] the court ordered a bill of foreclosure to stand over, to make a judgment creditor, the only incumbrancer not before the Court, a party. Lord *Alvanley* said, he was perfectly satisfied the general course of the Court, and almost the universal practice, had been to insist upon any one having a right to redeem, being made a party, and that the principal reason was the gross injustice that you might compel a

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[e] 3 Ves. 314.

mortgagee to re-convey to a mortgagor, where it appeared by his own answer that he had no right to it.

In a very recent case in Ireland,[f] a bill was filed for the foreclosure and sale of certain mortgaged lands; Lord Chancellor *Sugden* held that all the judgment creditors were properly made parties, whether the judgments were prior or puisne to the plaintiff's demand, and whether they constituted a legal or merely equitable lien, upon the estates. He said that, so far as he was acquainted with practice in England, it would, in strictness, be necessary to make all judgment creditors parties, and that, independently of the statute 3 & 4 Vict. c. 105, s. 22, (which enacts that a judgment entered up in any of the Superior Courts of Dublin, shall operate as a charge upon the real estate of the debtor) he felt himself bound to come to the conclusion that if it was not the absolute duty, it was at least the right of the plaintiff, to bring the judgment creditor before the court. But, he said, "I feel so deeply impressed with the incon-

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f *Rolleston* v. *Morton*, 1 Dru. & War. p 171.

venience which may result from this decision, that it will be my duty to consider whether I ought not to recommend the legislature, if necessary, to interfere, so great may be the expense and trouble imposed upon landed proprietors, so great the difficulty in effecting sales under the decree of this Court, in consequence of this decision."

In *Lewis* v. *Lord Zouche*,[g] a receiver was appointed in a suit instituted by incumbrancers who was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. The Vice Chancellor held that a judgment creditor might file a bill against the owner and receiver, to have his debts paid out of the surplus rents, without making the other incumbrancers parties.

Where a judgment intervenes between a first and second mortgage, the judgment creditor may file his bill to redeem the first mortgagee, without making the second mortgagee a party to the suit, in order to postpone him.[h]

An assignment of a judgment debt, is not an

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[g] 2 Sim. 388.

[h] 3 Swanst. 151.

assignment of "property," within the meaning of the statute 55 Geo. 3rd, c. 184, schedule part 1, title *Conveyance*, and does not, therefore, require any *ad valorem* stamp, but must have the ordinary deed stamp.[i]

A judgment debt due to a testator, which in his lifetime had been reported in a creditor's suit to be an incumbrance affecting the real estate of the debtor, was held not to pass by his will to a charitable use, being within the statute 9 Geo. 2, c. 36, which prohibits dispositions of lands, or of any charge or incumbrance affecting, or to affect them, to any charitable purpose otherwise than by deed, executed at least twelve months before the death of the donor.[j]

A judgment in the Lord Mayor's Court, obtained against a person as garnishee, does not entitle the plaintiff to rank as a judgment creditor, in the administration of the garnishee's assets.[k]

Of several judgment creditors, he who first sued out execution was preferred; but in a suit for

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[i] *Warren* v. *Howe*, 2 B. & C. 281.

[j] *Collinson* v. *Pater*, 2 Rus. & Myl 344.

[k] *Holt* v. *Murray*, 1 Sim. 485.

the administration of assets, where the creditors had not sued out execution, the judgments were satisfied according to their actual priority in point of time.[1]

A final decree in a court of equity, was, with respect to the course of administering the personal assets of the debtor, equivalent to a judgment at law, and stood in the same order of payment;[m] and, in such administration, was, like a judgment at law, satisfied according to its actual priority.[n]

The proper mode of discharging a judgment, is by entering up satisfaction on the roll, or by a release by deed.[o] A release of all suits is a complete discharge of the judgment.[p] But a release by the creditor of all his interest in the debtor's lands, did not prevent him from subsequently suing out execution, because, before execution, he had not strictly any *interest* in the property, which

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[1] *Rowe* v. *Bant*, 1 Dick. 152.

[m] *Morrice* v. *Bank of England*, 2 B. P. C. 465; *Perry* v. *Phelips*, 10 Ves. 34; 19 Ves. 588.

[n] *Martin* v. *Martin*, 1 Ves. sen. 211; *Lee* v. *Park*, 1 Keen, 719.

[o] *Barrow* v. *Gray*, Cro. Eliz. 552; 3 Bac. Abr. 372.

[p] 6 Bac. Abr. 633; Co. Litt. 291; 8 Co. 153.

was subject to the judgment. After such a release, however, the debtor might have an *audità querelâ*, and thereby annul the execution.[q]

Previously to the 3 & 4 Will. 4, c. 27, there was no statute limiting the time within which execution might be sued out upon a judgment; but satisfaction was generally presumed of an unexecuted judgment, which had been entered up for more than twenty years, unless some positive evidence was produced to rebut the presumption.[r]

The 3 & 4 Will. 4, c. 27, s. 40, however, enacts that no action, suit, or other proceeding shall be brought to recover any sum of money secured by any *judgment* or lien, but within *twenty* years from the accruer of the right, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by

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[q] *Barrow* v. *Gray*, Cro. Eliz. 552; 3 Bac. Abr. 372.

[r] *Hulke* v. *Pickering*, 2 Barn. & Cress. 555; *Greenfell* v. *Girdlestone*, 2 Y. & C. 662; *Causton* v. *Macklew*, 2 Sim. 242.

whom the same shall be payable, or his agent, to the person entitled thereto, or his agent.[s]

A revival by *scire facias* is sufficient to take a judgment out of the statute, and the period of limitation begins to run only from the date of the last revival.[t]

EFFECT OF JUDGMENTS UNDER THE RECENT STATUTES.

HAVING taken a brief view of the law as it stood prior to the 1 & 2 Vict. c. 110, we shall now proceed to examine such of the enactments of this statute, as relate to judgments against real estates.

But it is to be observed, that none of its provisions for extending the remedies of the judgment creditor, affect purchasers or mortgagees *without*

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[s] See *Berrington* v. *Evans*, 1 You. & Coll. 434.

[t] *Kealy* v. *Bodkin*, 1 Sausse. & Scu. p. 211; see also *Ottiwell* v. *Farran*, *Ib.* 218.

notice, and consequently, that as against such purchasers or mortgagees, the creditor must rely solely upon the old law, the 5th section of the 2 & 3 Vict. c. 11, having provided that no judgment, decree, rule, or order, shall, *as against purchasers and mortgagees, without notice thereof*, bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise, or more extensively in any respect, *although duly registered*, than a judgment of one of the Superior Courts would have bound such purchaser or mortgagee before the 1 & 2 Vict. c, 110, where it had been duly docketed according to the law then in force. But the 6th section provides that nothing in the said recited act, or in that act contained, shall affect or prejudice any judgment as between the parties thereto, or their representatives, or those claiming as volunteers under them.

Purchasers, however, should be cautious in placing much reliance upon this exemption, as notice might be inferred from slight circumstances, and, if proved, would lay them open to all those more extensive remedies which the previous statute gives to judgment creditors against the property of their debtors.

The 11th section of the 1 & 2 Vict. c. 110, after reciting that the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and that it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law, proceeds to enact, that upon any judgment which, at the time appointed for the commencement of that act, should have been recovered, or should be thereafter recovered in any action in any of her Majesty's Superior Courts at Westminster, execution may be delivered of all such lands, tenements, rectories, tithes, rents, and hereditaments, (including lands and hereditaments of copyhold or customary tenure,) as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as execution might then be delivered of one

moiety of the lands and tenements of any person against whom a writ of *elegit* was sued out; which lands, &c. shall accordingly be held by the party to whom such execution shall be delivered, subject to such account in the Court out of which such execution shall have been sued out, as a tenant by *elegit* is subject to in a court of equity: and it is provided, that such party to whom any copyhold or customary lands shall be delivered in execution, shall be liable to such payments and services to the lord of the manor or other persons entitled, as the person against whom such execution shall be issued would have been subject to in case such execution had not issued, and shall be entitled to hold the same lands until the amount of such payments and the value of such services, as well as the amount of the judgment, shall have been levied.

The judgment creditor, therefore, is no longer restricted to a moiety, but is enabled, by this section to take the whole of his debtor's lands in execution. Copyholds, we have seen, could not be attached under the Statute of Westminster, and, as the reasons which took copyholds out of the operation of that statute would equally apply to customary freeholds, it would seem that they also were not

liable to be taken under an *elegit*;[u] but all lands and hereditaments of a copyhold or customary tenure are now expressly made extendible equally with freeholds.

It has been suggested, in a work of considerable reputation, that terms of years, as well equitable as legal, continue to be unaffected by judgments until execution, on the ground that the enactment is worded in the same manner as that of the Statute of Frauds,[v] which was held not to include chattel interests;[w] but in another part of the same work the writer observes, "that it is not clear that leaseholds are not bound by the judgment equally with freeholds, the conclusion drawn, *infra*, vol. v. p. 48, from the similarity in language between the 29 Car. 2, c. 3, sec. 10, and the 1 & 2 Vict. c. 110, sec. 11, is, perhaps, too positively expressed."[x]

It will be remarked that this section of the Statute of Frauds speaks only of the lands, &c. of which the trustee shall be *seised* in trust

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[u] 2 Scriven on Copyholds, 678.

[v] 29 Car. 2, c. 3, s. 10.

[w] 5 Jarm. Conv. by Sweet, 48.

[x] 1 Jarm. Conv. by Sweet, 107.

for the debtor. It does not, however, appear that this was the ground of the decision pronounced in *Scott* v. *Scholey*,[y] for Lord *Ellenborough* considered the fact of the section mentioning only *lands and tenements*, sufficient to manifest an intention on the part of the legislature, that equitable interests in terms of years should continue exempt from execution. This decision, therefore, throws sufficient doubt on the 11th section of the present statute to forbid a positive assertion that terms of years can be extended under it; but at the same time it must be admitted that the language of the 11th section is sufficiently wide to comprehend them, and it is undoubtedly in accordance with the spirit of the act to hold that they are included. Sir *Edward Sugden* considers that leaseholds are bound equally with freeholds,[z] and his opinion is believed to meet with the general approbation of the profesion.[a] Indeed it can hardly be supposed to have been intended that leaseholds should be still extendible only under the Statute

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y 8 East, 467.

z 2 Sugd. V. & Pur. 10th edit. 401.

a See 1 Dru. & War. 182.

of Westminster, and therefore for no more than a *moiety*, and that they should be bound *at law* only from the time of execution sued, whilst a judgment is, beyond a doubt, made a charge *in equity* by the 13th section, upon the *entirety* of the leaseholds of the debtor, from the time that the judgment is entered up.

If legal terms of years are within the 11th section, it would most probably be held that a simple trust of a term of years might be taken in execution under it.

The effect, however, of the statute 2 & 3 Vict. c. 11, s. 5, is to protect all purchasers *without notice*, of a chattel interest in land, from antecedent judgments, unless the writ is lodged in the sheriff's office before the date of the purchase: and the mere circumstance of the writ of execution having been sued out before the date of the purchase would be immaterial as to a purchaser *without notice* of lands of a copyhold tenure, inasmuch as that description of property was not liable to execution under the Statute of Westminster.

It is also evident from the 2 & 3 Vict. c. 11, s. 5, that a purchaser without notice of a judgment can now, as formerly, protect himself against it by obtaining the assignment of a *prior* legal term

to attend his inheritance; but it may be observed, that if a trust of a term of years should be extendible under the 11th section, and the purchaser can be attached with notice, the creditor will now be able to prosecute his judgment against the land in the hands of the purchaser *at law* as well as in equity.

It will be readily seen, that cautious purchasers will now make searches for judgments in many cases where, under the old law, searches would have been probably dispensed with. Want of notice, indeed, does protect purchasers from the operation of the new provisions, but for the reason already stated, this fact cannot be safely relied upon. Sir Edward Sugden's advice is, that in no case should a purchaser neglect a search. "It is no longer safe (he continues) to rely upon an outstanding legal estate; the execution of a power will not defeat the judgment, and it binds equitable as well as legal estates; powers amounting to ownership, as well as actual estates. Even the most solvent person may have an order of some Court against him for payment of costs, which the person obtaining it may choose to make binding upon purchasers; and although the provision in the 2 Vict. c. 11, s. 5, is a great safe guard to

purchasers, yet it would not be wise to rely upon it, as notice may be proved by slight circumstances."[b]

By analogy to the construction which has been put upon the 10th section of the Statute of Frauds, it is apprehended that no equitable interest of the debtor, which is subject to particular charges, or of which, from any other cause, he has not the sole beneficial ownership,[c] can be taken in execution under the 11th section of this statute.

Whilst, formerly, those trust estates only could be taken in execution of which the debtor's trustee was seised at the time of execution sued,[d] a judgment is now made a legal lien upon all lands held in trust for the debtor at, and at any time after, the period of its being entered up; so that a judgment creditor who can fix a purchaser with notice, will not, under the new act, be compelled to resort to a court of equity for relief against the conveyance of the legal estate, subsequently to his judgment, but will be able to take the lands in execution by legal process.

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[b] 2 Sugd. V. & P. 10th edit. 103.

[c] *Harris* v. *Booker*, 4 Bing. 96. *supra* p. 16.

[d] *Hunt* v. *Coles*, Com. Rep. 226. *supra*, p. 41.

Another important change effected by this section has been to deprive an appointment under a power exerciseable by the donee for his own benefit *without the assent* of any other person, of the effect it formerly had[e] in defeating judgments entered up against him subsequently to the creation of the power; but in this case, if the appointee is a purchaser *without notice*, he will, of course, be entitled to the benefit of the 5th section of the 2 & 3 Vict. c. 11, and an appointment will then be as effectual in protecting him from judgments as it was under the old law.

Another consequence of the new law is, that the creditor will not be deprived of the benefit of his judgment in cases of joint-tenancy by reason of the death of the debtor in the lifetime of his co-tenant, and before the execution of the *elegit*, but will be entitled to the same remedies against the share which has survived, as he would have had in the lifetime of the debtor.

Under the 11th section, it is conceived that the issue in tail and remainder-men, though not ex-

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[e] *Supra*, p. 33.

pressly named in it, will, where there is no protector, be bound by judgments entered up against the tenant in tail, inasmuch as he has, in the words of the section, a disposing power, which he might, without the assent of any other person, exercise for his own benefit. The 13th section, however, is express on this point; and in purchasing from such issue or remainder-men, it will now be necessary to search for judgments against the preceding tenants in tail. And where there is a protector, as the tenant in tail can create a base fee without his consent, the judgment will bind the land to that extent.

If a joint judgment is entered up against the joint donees of a general power of appointment, it would seem, upon principle, that a joint power under such circumstances must be considered a disposing power within the meaning of the 11th section, and the interpretation clause (121st sec) appears to favour this construction.

There is also reason to believe that a general power of appointment *by will*, is within the meaning of the section, for in this case the debtor has a disposing power which he may execute so as to increase his testamentary estate, and in that sense, for his own benefit.

The object of the statute certainly is, to afford relief to the creditor, to the extent of the debtor's beneficial interest, whether vested, or attainable by execution of a power, or otherwise; and therefore, the enactments must be held to extend to all cases where the debtor has a general uncontrolled power of appointment, not limited to particular objects, or to specific purposes.

It will be remarked that the 11th section provides no remedy for the judgment creditor in those cases where legal execution is, from the nature or condition of the property, impracticable. In such cases, however, he will be able to render his security available in equity, it being expressly provided by the 13th section that, a judgment then entered up, or which might be entered up against any person in any of her Majesty's Superior Courts at Westminster, shall operate as a charge upon *all* lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards be seised, possessed or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy,

or over which such person should, at the time of entering up such judgment or at any time afterwards have any disposing power, which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, &c., and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of the act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon. But it is provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, and that no such charge shall

operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy.

Under the old law, a judgment was a mere general lien, and equity, in assisting a judgment creditor who had no means of enforcing execution at law, merely exercised its general jurisdiction in the administration of relief. And as a general rule, courts of equity were guided, as to the extent of the relief, by the Statute of Westminster, which gave the *elegit* in the first instance;[f] and refused to interfere on the creditor's behalf until the *elegit* under that statute had been sued out.[g] But the 13th section of the 1 & 2 Vict. c. 110, places a judgment creditor on a very different footing in equity. It makes a judgment a specific charge upon all the property which is rendered liable to be extended under the 11th section, together with such reversionary interests as cannot be taken in execution, advowsons in gross, property in expectancy, equities of redemp-

[f] *Stileman* v. *Ashdown*, 2 Atk. 608.
[g] *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 407

tion, and trust estates, in which the debtor has not the sole ownership. In *Rolleston* v. *Morton*,[h] Lord Chancellor *Sugden*, referring to the 3 & 4 Vict. c. 105, sec. 22—which enacts that a judgment entered up in any of the Superior Courts of Dublin, shall operate as a charge upon the real estate of the debtor—observed, "the act of Parliament is perfectly clear, and free from all ambiguity and doubt. That which formerly, by force of the statute of Westminster, was a general charge upon lands, now by force of the express directions of this act, becomes a specific lien: words cannot be more express. If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them, and a court of equity will execute the charge. When the act of Parliament says that every judgment creditor shall have the same remedies in a court of equity, as he would be entitled to in case the person against whom the judgment has been entered, had agreed to charge the lands, with the amount of that judgment debt, whether that charge be legal or equitable, the judgment becomes in the view of this court an equita-

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[h] 1 Dru. & War. 195.

ble estate. We are no longer dealing with a general lien, but with a specific incumbrance."

As the judgment creditor obtains a specific charge upon the property, it is open to contend that, if he obtains his security without notice, he is now placed on such a footing as will entitle him, by reason of his legal lien, to prevail over a prior equitable mortgage.[i] Again, if a judgment under the 13th section is to operate to all intents and purposes, as if the debtor by writing, under his hand, had actually charged his real estate, it probably amounts to a revocation *pro tanto* of a previous voluntary settlement,[j] and will enable the creditor to tack his judgment debt to a prior legal mortgage, in exclusion of a mesne incumbrance.[k] It is, however, by no means clear what construction this section will receive with reference to these important questions.

At the time when judgments were mere general liens, Lord *Kenyon*, in *Richards* v. *Barton*,[l] said "that an abstract ought to mention every incum-

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[i] See 2 Sugd. V. & P. 10th edit. 397 ; *Higgon* v. *Syddal*, 1 Ch. Cases, 149; *supra*, p. 16.

[j] 27 Eliz. c. 4, s. 2 ; *Buckley* v. *Mitchell*, 18 Ves. 100 ; *Daubeny* v. *Cockburn*, 1 Mer. 638.

[k] *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 490.

[l] 1 Esp. Rep. 267.

brance whatever affecting an estate, upon which any security was about to be placed; and should, therefore, contain an account of every judgment by which the estate was affected." This, however, was not the practice of the profession previously to the statute under discussion. As that statute makes the judgment a specific charge upon the debtor's real estate, it appears to be now more than ever incumbent upon the vendor or mortgagor to shew upon the face of the abstract all the judgments which affect the land. This is clearly the opinion of Sir *Edward Sugden*, who, in the last edition of his Vend. & Pur.[1] states distinctly that the practice must be altered, and that the seller's attorney can no longer safely keep back a list of judgments, but is bound to set it forth on the abstract, like every other charge upon the property.

It will be proper here to advert to a statute of 4 & 5 W. & Mary, c. 16, with respect to mortgages made by persons who, having borrowed money upon judgments which they have voluntarily given, omit to give notice of such incumbrances to their mortgagees. The 2nd section

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[1] 2 vol. p. 381.

of that statute, enacts "That if any person shall borrow any money, or for any other consideration, for the payment thereof voluntarily give, acknowledge, permit, or suffer to be entered against him or them, one or more judgment, or judgments, statute or statutes, recognizance or recognizances, to any person or persons, creditor or creditors; and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money, of any other person or persons, or for other valuable consideration become indebted to such person or persons, and for securing the re-payment and discharge thereof, shall mortgage his, her, or their lands or tenements, or any part thereof, to the said second, or other lender or lenders of the said money, creditor or creditors, or to any other person or persons, in trust for, or to the use of, such second lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment or judgments, &c., in writing, under his, her, or their hand or hands, before the execution of the said mortgage or mortgages, unless such mortgagor or mortgagors, his heir, or their heirs, upon notice to him, her, or them, given by the mortgagee or mortga-

gees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, in writing, under his, her, or their hands and seals, attested by two or more sufficient witnesses of any such former judgment or judgments, &c., shall, within six months, pay off and discharge the said judgment or judgments, &c., and all interest and charges due thereupon, and cause, or procure the same to be vacated or discharged by record, that then the mortgagor or mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity, or elsewhere, for redemption of the said lands and tenements, or any part thereof; but the said mortgagee and mortgagees, his, her, or their heirs, &c., shall enjoy the lands and tenements as if the same had been absolutely purchased."

The terms of the 13th section of the 1 & 2 Vict. c. 110, are so comprehensive as to leave no doubt that leaseholds, both legal and equitable, are within its provisions.

This act makes a judgment a lien both at law and in equity, upon all which the debtor has, and

upon all which he can dispose of. If the debtor has a sole power of appointment which he may exercise for his own benefit, the judgment becomes an immediate lien upon the lands over which the power extends, and must be treated, *pro tanto*, as a statutory execution of the power in favour of the creditor. But a joint power, (except in the case of a joint judgment, *supra*, p. 64,) is evidently not within the act, which relates especially to the lands, &c., over which the debtor has a disposing power, which he can exercise without the assent of any other person. A person, therefore, claiming under the execution of a joint Power of appointment, may with safety disregard even the judgments of which he has notice, if the donee has no ulterior interest. But if the debtor be the donee of a joint power with an ulterior estate, it becomes an important question whether he can concur with his joint donee in exercising the power, so as to defeat the charge of the judgment creditor upon that estate. It is a well-known principle, that if a person, having a power of appointment, and an estate subject to the power, makes a lease, or grants any other interest by virtue of his estate, he cannot exercise the power in derogation of his own grant. But a judgment

was not considered an act done by the party, but a proceeding *in invitum*,[a] and consequently the donee was able, by means of an appointment, to displace the creditor's lien. The 13th section of this act, however, makes a judgment a specific charge, and this is followed up by providing that every judgment creditor shall have such and the same remedies in a court of equity, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the hereditaments, and had, by writing under his hand, agreed to charge the same. It would, therefore, seem that a judgment is now to be considered in equity as equivalent to a charge voluntarily created by the debtor; and it is abundantly clear, that if such a charge had been made, a court of equity would not allow it to be prejudiced by any subsequent appointment, except in the case of the appointee being a purchaser for a valuable consideration without notice.

There are even grounds for contending, under the 11th section, that the judgment creditor would be entitled to have the estate which his debtor had in the land, delivered to him without regard to the power of appointment. By that section

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[a] *Supra*, 33.

the sheriff is not only to extend what the debtor has, but all that the debtor by his own act, without the assent of another person, can dispose of; and as it is clear that the debtor could by his own act make a conveyance of his estate so as to be indefeasible by any subsequent execution of the power, it would seem not unreasonable to hold that the judgment would give the creditor a right to have a similar indefeasible estate extended.

We have seen that a judgment creditor lost the benefit of his security, as against the assignees of a bankrupt, unless the execution was complete before the act of bankruptcy;[n] but this section, by giving the judgment creditor a specific charge, allows him a preference in bankruptcy, provided the judgment shall have been entered up one year at least before the bankruptcy, and shall have been obtained adversely, or by default, confession, or *nihil dicit*, in any action according to the practice of the Court, commenced *adversely*. On a sale, therefore, by the assignees, it will be necessary in future, to search for judgments against the bankrupt, down to the commencement of the one year next preceding the bankruptcy.

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[n] *Supra*, 33; *Barker* v. *Goodair*, 11 Ves. 84. See 2 & 3 Vict. c. 29, s. 1.

It has been decided by Lord Chancellor *Sugden*, in a very recent case,[a] that the 126th section of the statute 6 Wm. 4, c. 14, (which relates to bankrupts in Ireland, and, like the 6th Geo. 4, c. 16, s. 108, provides that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with other creditors,) has not been repealed by the 22d section of the statute 3 & 4 Vict. c. 105, (which is a provision precisely corresponding to the 13th section of the 1 & 2 Vict. c. 110,) and consequently, that judgments which are founded on warrants of attorney have still no preference in bankruptcy, although they may have been entered up more than one year before the bankruptcy. The case referred to came before the Court under the following circumstances :—

A. P. being indebted to *A. N.* in the sum of 1518*l*, on the 10th of November, 1837, executed to her his bond, conditioned for the payment of that sum with interest. A warrant of attorney

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[a] *In re Perrin*, 2 Dru. & War. 147.

for confessing judgment was annexed to this bond, and judgment was accordingly entered thereon in the Court of Exchequer, in Michaelmas Term, 1837. Upon the marriage of *A. N.*, the judgment was assigned to trustees upon the trusts of the settlement executed upon that occasion, and which was dated the 6th of March, 1838. In Easter Term, 1841, the judgment was revived. In the month of February, 1841, a commission of bankruptcy issued against *A. P.*, and, under this commission, debts to an amount exceeding 1100*l.* were proved by simple contract creditors of the bankrupt. On the 2d of November, 1841, the trustees filed a charge in the matter of the bankruptcy, by which they insisted that, as judgment creditors of the bankrupt, whose judgments had been entered up more than one year before the bankruptcy, they were entitled to a special lien upon the freehold and leasehold estates of the bankrupt as against all simple contract creditors of the bankrupt, whose debts originated previously to the 1st of November, 1840,[b] and as against all his judgment and specialty creditors

[1] The 1st of November, 1840, is the time which was appointed for the commencement of the Act of 3 & 4 Vict. c. 105.

previously to that date, who claimed under judgments or specialties subsequent to the judgment of Michaelmas Term, 1837, and also as against all his creditors whose debts originated on and since the 1st of November, 1840. On the 3rd of November, 1841, *R. H.*, the assignee of the bankrupt, filed a discharge, which simply controverted the claims insisted upon in the charge.

The case having been argued before his Honor Mr. Commissioner *Macan*, he decided that the trustees were not entitled to any priority or preference as to the lands of the bankrupt over his other creditors. This decision was confirmed on appeal by Lord Chancellor *Sugden*, and the following quotation from his Lordship's judgment will shew the reasons on which he grounded his opinion. "Here the question is, whether an additional provision for every judgment creditor repeals the former liability. The principle upon which *Whitmore* v. *Robertson*[a] was decided, is, that the later act should not operate beyond its immediate purpose where there was no conflict, and no apparent intention to repeal the former provision. I must apply the same principle to this case. Now here,

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[a] 8 M. & W. 463; *supra*, p. 39.

whilst the judgment was a general lien, and would bind only part of the debtor's property, the creditor, where the judgment was on a warrant of attorney, was prohibited by our Bankrupt Act from having the benefit even of his execution (and in this case there was not any execution) unless there had been a sale before the act of bankruptcy. The act of 3 & 4 Vict. extends every judgment as a charge on all the debtor's property, but there is no reason (unless it be so enacted) why that which as a general lien was subject to be cut down in bankruptcy, shall not remain subject to that liability, although it has become a specific charge. The twenty-second section of the 3 & 4 Vict. expressly saves to a judgment creditor his former rights. Now those rights must be saved subject to the existing restrictions, and it would be difficult to hold that so far as judgments operated under the old acts they would be bound by the 126th section of the Bankruptcy Act, whereas, as far as they operate under the 3 & 4 Vict., they were relieved from the operation of that section. The judgment is still within the precise term of that section, although it has had a greater range assigned to it over the debtor's property. But the question is not to what extent it is to charge

the property where no bankruptcy intervenes, but whether it is to operate to give him any right as against the other creditors under a bankruptcy beyond that of a rateable part. If I decide against the right, I carry the rule no farther than it went before the late act. In either case the whole security is destroyed. It cannot make any difference that in one case it bound only half the property, and in the other the whole of it, unless, indeed, the latter case should be held to fall more clearly within the principle of an equal division in the given case between the creditors. The provision that the charge shall not operate to give the judgment creditor any preference in case of bankruptcy, unless such judgment shall be a year old, does not appear to me to be a virtual repeal of the 126th section of the Bankrupt Act, because that clause would still operate upon judgments not within that section, and it is not inconsistent to say that the charge provided for the creditor in the later act shall not be available in bankruptcy unless the judgment be a year old, although by an existing provision not intended to be repealed, a judgment on a warrant of attorney —a particular class of judgments - is altogether invalidated in bankruptcy. It would stand thus :

first, judgments are a general lien, but judgments on warrants of attorney are not to have a preference in bankruptcy; secondly, judgments shall be a specific lien, but still, judgments on warrants of attorney shall not have a preference in bankruptcy, nor shall this specific lien operate to give any judgment creditor a preference in bankruptcy, unless it be a year old. There is nothing inconsistent in this; and where we have to spell out the intention of the legislature in a case like the present, we can hardly escape from all difficulties."

As purchasers without notice are entirely exempted from the recent provisions so far as they enlarge the rights of the judgment creditor, it is clear that on a sale by the assignees of a bankrupt, no judgments against him, on which execution had not been sued out before the issuing of the fiat, would be a charge on his real estate in the hands of any purchaser, who cannot be attached with notice.[m]

It may be useful to observe by way of caution,

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[m] See 6 Geo. 4, c. 16, s. 108, *ante*, p. 33; 2 & 3 Vict. c. 29, s. 1; 2 & 3 Vict. c. 11. s. 5.

that all judgments entered up against a mortgagor subsequently to the mortgage, are charges upon the surplus of the monies arising from a sale under a power contained in the mortgage deed, and that the mortgagee would be bound to apply such surplus in the proper discharge of all such judgments of which he has notice. Indeed there is no reason to doubt that even under the old law, all such judgments were general charges in equity upon the surplus monies in the hands of the mortgagee.[n]

It is almost needless to remark that the proviso introduced in the 13th section, that no proceedings in equity should be taken by the creditor to obtain the benefit of his charge until after the expiration of one year from the time of entering up the judgment, would not prevent the Court from exercising its general jurisdiction in his favour, if necessary, within that period. There is nothing, for instance, in the section to prevent a judgment creditor from filing his bill, as he formerly might,

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[n] See Mr. Serjt. *Hill's* opinion stated in *Forth* v. *Duke of Norfolk*, 4 Madd. 506, note ; 5 Jarm. Conv., by Sweet, 47, 444.

at any time after the judgment has been entered up for the redemption of a prior incumbrance ; or, if the debtor dies before the judgment has been entered up a year, the creditor might instantly apply to the court for the administration of his assets.

The 13th section concludes with a proviso that nothing therein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice. The object of this proviso was, that purchasers without notice might be able to protect themselves from judgments by any means which were effectual for this purpose before the statute, so far as the property of the debtor is not extendible under the 11th section. But this particular provision of the act for the protection of purchasers and mortgagees without notice, is rendered unimportant by the more extensive operation of the 2 & 3 Vict. c. 11, s. 5, which protects them from all the recent provisions which extend the legal or equitable remedies of the judgment creditor beyond what they were under the old law.

And as to purchasers, mortgagees, or creditors, who became such before the 1st of October, 1838,

the 11th and 13th sections provide against any judgment affecting them otherwise than as the same would have affected them if the act had not passed.

In re Perrin,[a] it was insisted that the word "creditors," means creditors *ejusdem generis*, and that, viewing the 22d section of the 3 & 4 Vict. c. 105, with certain other provisions of that act, relating to elegits and receivers, simple contract creditors were not entitled to the benefit of the proviso; but his Lordship objected to this construction, "for here, (he said) the word 'creditors' is used generally, whilst in other places, throughout the act, wherever it was not intended to use the word in a general sense, it is qualified, and the expresion is "judgment creditor," or the like. Besides this, simple contract creditors are clearly within the mischief, against which the proviso is intended to guard; for the object of the proviso was to protect prior existing rights from the general operation of the section."

Formerly, the creditor was not obliged to account *at law* for more than the extended

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[a] 2 Dru. & War. 147.

value.[a] But if the debtor applied to a court of equity for relief, the creditor was compelled to account for the whole that he had received, upon the terms of the debtor allowing interest on the judgment, although it might exceed the penalty.[b] Again, interest upon a judgment could not be charged upon the land under the elegit, nor was it allowed in accounts in equity,[c] or recoverable by action at law, unless the warrant of attorney authorized the judgment to be entered up for more than the amount actually due,[d] or unless the original debt carried interest,[e] or there were other special circumstances in the case to induce a court to grant it.[f] And the claim of the creditor in equity to interest, when it could be allowed, generally depended upon his having previously

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[a] *Price* v. *Varney*, 3 B. & C. 733; *Earl of Bath* v. *Earl of Bradford*, 2 Ves. sen. 589.

[b] *Godfrey* v. *Watson*, 3 Atk. 517.

[c] *Bedford* v. *Coke*, 1 Dick. 178; *Creuse* v. *Hunter*, 2 Ves., jun. 169, n.; *Deschamps* v. *Vanneck*, *id.* 716; *Hickson* v. *Aylward*, 1 Ll. & G. 231; *Gorman* v. *Arthure*, 1 Ll. & G. 235.

[d] *Tunstall* v. *Trappes*, 3 Sim. 299.

[e] *Lind* v. *Domegall*, 1 Ll. & G. 227.

[f] *Morgan* v. *Evans*, 8 Bl. N. S. 777; *Ashenhurst* v. *James*, 3 Atk. 270; *Hyde* v. *Price*, 6 Sim. 578. See also 3 & 4 Wm. 4, c. 42, ss. 28 & 30.

brought an action on the judgment to recover damages.[g] The 11th section of the 1 & 2 Vict. c. 110, however, subjects the creditor to such account in the Court out of which execution shall have been sued, as a tenant by elegit is subject to in a court of equity; and the 17th section provides that every judgment shall carry interest at the rate of 4*l.*, per centum per annum from the time of entering up the judgment, or from the time of the commencement of the act, in cases of judgments then entered up, and not carrying interest until the same should be satisfied, and that such interest may be levied under a writ of execution on such judgment.

But no interest could be recovered under the 17th section, as against a purchaser, mortgagee, or creditor, *with notice*, unless the proper memorandum had been previously left with the registering officer,[h] or as against a purchaser, or mortgagee, *without notice*, whether the judgment had been registered or not.[i]

With respect to a judgment on a bond and warrant with a penalty, it has been decided in Ireland,

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[g] *Gaunt* v. *Taylor*, 3 Myl. & Keen, 302.
[h] See 3 & 4 Vict. c. 82, s. 2.
[i] S e 2 & 3 Vict. c. 11, s. 5.

that the 42nd section of the statute 3 & 4 Wm. 4, c. 27; (which provides that no arrears of rent, or interest, in respect of any sum of money charged upon or payable out of land, shall be recovered for more than six years,) will not prevent the creditor from recovering the full amount of interest up to the penalty.[j]

The foregoing observations are equally applicable to all decrees and orders of courts of equity, all rules of courts of law, all orders of the Lord Chancellor, or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person; for by the 18th section, such decrees, orders, and rules, are respectively put upon the footing of judgments in the superior courts of common law.

In *Gibbs* v. *Pike*,[k] the court entertained considerable doubts whether an order of a Court of equity for the payment of a sum of money into the Bank, in the name of the accountant general, to the credit of a cause depending in that court, is an order

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[j] *Kealy* v. *Bodkin*, 1 Sausse. & Scu. 220.

[k] 6 Jur. 465; 8 M. & W. 237; See also *Wells* v. *Gibbs*, 3 Beav. 399.

within the meaning of the 18th section; but at the same time, without being called upon to pronounce a decision on the point, they expressed it to be their opinion that such an order was within the equitable meaning of the statute.

The sum of money payable by a rule of a court of common law, must be expressed in the rule itself, and, therefore, where a sum of money has been awarded to be paid under an agreement of reference, which is afterwards made a rule of court, the money is not payable in that rule within the meaning of the above section.[y] But a rule to shew cause, why the money should not be paid pursuant to the award, may be obtained, which, when made absolute, will entitle the party to sue out execution under the statute.

It seems that a rule absolute for the costs of the day, becomes an order of the Court for the payment of the costs, when the Master's *allocatur* is made, and entitles the party obtaining that rule, to issue execution under the statute for such costs as should be found due by the Master on his *allocatur*.[z]

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[y] *Jones* v. *Williams*, 11 Adol. & El. 175.

[z] *Richards* v. *Patterson*, 8 M. & W. 313; *Doe* v. *Amey*, *ib.* 565.

[a] *Hobson* v. *Paterson*, Leg. Obs. June 14th, 1842.

The words "money or costs, charges or expences," mean money decreed or ordered to be paid together with the costs, &c., to be ascertained on taxation by the officer of the court, and no order to pay costs is requisite after taxation.[b]

When it is referred to the Master under a judge's order, which is made a rule of court, to ascertain the amount which the plaintiff is entitled to recover, and the Master allows a sum of money for costs, the plaintiff may treat the Master's report as an *allocatur*, and take out execution under the rule for the amount of the costs allowed, without further application to the court.[c]

A party entitled to costs under an interpleader order may make the order a rule of court, and have execution under the 18th section.[d]

In *Neale* v. *Postlethwaite*,[e] the costs of an attorney against his client were, by a rule of court, referred to taxation by the Master, on the usual undertaking to pay what should be found due. The Master having made his *allocatur*, and the money not having been paid, the court made an order

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[b] *Jones* v. *Williams*, 8 M. & W. 349.

[c] *Watson* v. *Holcombe*, Leg. Obs. June 18th, 1842.

[d] *Cetti* v. *Bartlett*, 20 Law Journal, Ex. 292.

[e] 1 Adol. & El. N. S. 243.

that the client should pay the money, but that the attorney should abandon his right to move for an attachment, the purpose of applying for such order being that the attorney might become a judgment creditor under the 18th section.

The 19th section of the 1 & 2 Vict. c. 110, enacts that no judgment, decree, order, or rule, shall, *by virtue of that act*, affect purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which the same shall have been obtained or made, and the date thereof, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior Master of the Common Pleas at Westminster; who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of 5*s*.; and all persons shall be at liberty to search the same book on payment of the sum of 1*s*. The

3d section of the 2 & 3 Vict. c. 11, makes it further requisite that the year and the day of the month, when the memorandum is left, shall also be inserted in the book.

The judgment creditor has here placed before him the steps he must take before he can entitle himself to the additional remedies given by the new act against purchasers, mortgagees, and other creditors. Nothing more is required of him than that he shall leave the proper memorandum with the senior Master, and pay the fee. It may be the more prudent course for the creditor to see that the entry is made before he leaves the office: as, however, it is not made incumbent on him to ascertain that the officer does in fact make the entry, it should seem that the judgment security can in no degree be prejudiced by the officer's neglect. Purchasers who may suffer from the neglect of the officer to make the entry required by the act will have a remedy against him by an action on the case, similar to that which, previously to the passing of the act, they might have had for an omission to docket a judgment.[f]

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[f] *Douglas* v. *Yallop*, 2 Burr. 722.

A very important question arose upon these provisions, which has since been set at rest by a statute, to which we shall presently advert. It was most probably intended to give purchasers, mortgagees, and creditors, a complete protection against judgments not registered in the way pointed out by the 19th section; but there seemed no greater difficulty in letting in the equitable doctrine of notice, as an exception to this rule, than there was formerly under the statute of Wm. & Mary. The words of this last mentioned act are equally strong. It provided that no undocketed judgment should affect lands as to purchasers or mortgagees; yet it was held by Lord *Eldon*, in *Davis* v. *Earl of Strathmore*,[h] that, notwithstanding these words, an undocketed judgment did affect a purchaser in equity, if he had notice of it when he made his purchase, by analogy to the decisions under the registry acts. The corresponding section in the new act contains no express exclusion of the equity in question; but by the statute 3 & 4 Vict. c. 82, s. 2, after reciting that doubts had been entertained whether a purchaser, mortgagee, or creditor hav-

[h] 16 Ves. 419.

ing notice of any such judgment, decree, order, or rule, as in the prior act mentioned, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same, as in the said act is mentioned, might not have been left with the senior Master of the Court of Common Pleas, it is enacted that no purchasers, mortgagees, or creditors, shall, *by virtute of the recited act*, be affected by any judgment, decree, order, or rule, notwithstanding any notice thereof, until a memorandum, as in that act mentioned, shall have been left with the senior Master of the said Court of Common Pleas at Westminster.

The 3 & 4 Vict. c. 82, particularly relates to judgments which have not been entered in the Common Pleas, and it is therefore conceived, that a purchaser with notice of lands lying in a register county would have no right to set up the mere circumstance that the creditor has omitted to register his judgment in the local court, as a ground for claiming the protection of this statute.

The effect of this statute with respect to purchasers with notice, we shall consider in connexion with the closing of the old dockets by the statute next referred to.

It will be observed, that the 19th section pro-

vided that judgments should not, *by virtue of that act*, affect purchasers, &c. unless the foregoing directions as to registration were complied with: but it did not take away from the judgment creditor any of those powers and rights which he possessed under the old law by docketing his judgment: it did not, in short, close the old dockets, though such, probably, was the intention. But by the 1st section of the 2 & 3 Vict. c. 11, provision is made for the immediate and final close of these dockets, without prejudice to judgments already docketed and entered; and the 2d section enacts that no judgment already docketed and entered under the act of Wm. & Mary, shall, after the 1st of August, 1841, affect purchasers, mortgagees, or creditors, until such memorandum thereof as is prescribed in the 1 & 2 Vict. c. 110, shall be left with the registering officer.

As docketing is now rendered impossible, and the 2d section of the 2 & 3 Vict. c. 11, in terms refers only to judgments *already* docketed, it is open to contend that a judgment which has never been docketed, may, to the extent of the old law, be binding upon a purchaser, although it has never been registered. But such a result would be so inconsistent with the spirit and declared object of the

act, that the Courts might, probably, construe the provisions of this section, to extend to every judgment, without regard to the question whether it was, or was not, docketed at the time of the act.

We have seen that the judgment creditor, by fixing a purchaser with notice, could render the lien in equity as effectual against him as if he had observed the requisitions of the Docket Act; and there seems nothing in the new acts to deprive the creditor of the like privilege now. It is true, he cannot avail himself of the more extensive remedies given by these acts, unless he leaves the proper memorandum of his judgment with the registering officer, because the 3 & 4 Vict. c. 82, makes notice, so far as regards these remedies, immaterial; the enactment, however, is not general, but only that no judgment shall, *by virtue of the* 1 *&* 2 *Vict.*, affect purchasers, &c. It seems, therefore, clear, that the same principle on which it has been held that the omission to docket a judgment was an immaterial fact against a purchaser with notice, must, as regards the creditor's *old remedies*, be applied to the 2d section of the statute 2 & 3 Vict. c. 11; and it is conceived, that to the same extent to which the judgment creditor could, under the Statute of Westminster, attach the land, he can still do so in the hands of a pur-

chaser *with notice*, although no step has been taken for getting the judgment registered.

The 3d section of the statute of Wm. & Mary, enacted that no judgment, not docketed, should affect any lands or tenements, as to purchasers or mortgagees, or *have any preference against heirs, executors or administrators*, in the administration of their testator's or intestate's estates; and in the administration of assets, a judgment was considered, as we have before observed,[a] a simple contract debt, unless it had been docketed pursuant to this statute. But now that it is no longer possible to docket a judgment under its provisions, and the statutes of Victoria only provide that an unregistered judgment shall not affect lands, tenements, and hereditaments, it may be questioned whether a judgment creditor will not now be entitled to precedence in an administration of assets by an executor or administrator, although he may have omitted to leave any memorandum of his judgment with the senior Master.

The local register acts are not affected by the recent statutes, and consequently, with reference to property lying in a register county, it will be

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[a] *Supra*, p. 12.

still necessary to bear in mind the consequences of omitting to enter judgments at the respective county register offices.

The Registry Act for Middlesex provides that no judgment shall bind any lands in that county, until a memorial has been entered in the local office; but in the case of lands lying in any of the other register districts, it will be necessary for a purchaser to search in the Common Pleas for at least such periods as by the respective local acts are allowed to elapse between the entering up of the judgment and the local registration; since a judgment, which would not be disclosed by a search in the register district, would, from being afterwards registered in that district within the period required by the particular act, have relation to the time that it was registered in the Common Pleas, and might so prevail against the purchaser.

Although the lands may lie in a register county, it is by no means clear that the search, which is generally required in the Common Pleas, can in any case be safely dispensed with, unless the purchaser search the local office for the full period of twenty years, as under the old law; for as the provisions for the re-registration of judg-

judgment obtained in either of the Superior Courts at Westminster may be sued out against lands in either of the Palatine counties,[k] it would be necessary to extend the search to the general register provided by the statute 1 & 2 Vict. c. 110.

Judgments of certain inferior Courts of Record, and rules or orders of such Courts for the payment of any sum of money, or any costs, charges, or expenses, may, by the 22d section, be removed into any of the Superior Courts at Westminster, or into the Court of Common Pleas of Lancaster, if the inferior court be within the county, and immediately thereupon, such judgments, orders, or rules, shall be of the same force, charge, and effect as a judgment recovered in, or a rule or order made by, such Superior Court. But *it is provided* that no such judgment, rule, or order, when so removed, shall affect purchasers, mortgagees, or creditors, any further than the same would have done, if the same had remained a judgment, rule, or order, of such inferior Court, *until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same.*

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[k] 1 Lev. 256; *Chapman* v. *Maddison*, 2 Str., 1089; 2 Wms. Saund. 194.

The provisions of the 1 & 2 Vict. c. 110, for registry, are not made expressly applicable to inferior judgments when removed, but inasmuch as they can have only the *same* force, charge, and effect, as judgments recovered in the Superior Courts, it is clear that, on being removed, they must be registered in like manner as judgments originally recovered in the Courts into which they are removed.

The proper construction, indeed, seems to be to consider them in all respects as the judgments of such Superior Courts, subject, however, to the proviso at the end of the section; and if they are to be so regarded with respect to this act, they must also be held to be within the provisions as well of the 2 & 3 Vict. c. 11, (by the 5th section of which, it will be remembered, a most important protection is given to purchasers against judgments of which they had no notice,) as of the 3 & 4 Vict. c. 82, the 2nd section of which, we have seen, provides that no judgment, of which a memorandum has not been left with the Senior Master, shall, as to the extended remedies of the new law, be binding upon a purchaser, although he may have notice.

An important question to purchasers, and es-

pecially to those who have no outstanding term, or other means of protection from incumbrances to rely upon, is, for how long a period a judgment, from the time of its being entered up, continues an effectual lien upon the property. Previously to the late act, searches were frequently carried back for the preceding twenty years. But the necessary period for searching for judgments is now greatly shortened by the 4th section of the 2 & 3 Vict. c. 11, which enacts, that all judgments, &c. registered, or hereafter to be registered, under the act of the 1 & 2 Vict., shall, after the expiration of five years from the date of the entry thereof, be null and void as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance, is again left with the senior Master of the Court of Common Pleas, *within five years* before the execution of the deed or instrument transferring the legal or equitable estate or interest to any such purchaser or mortgagee for valuable consideration; or as to creditors, within five years before the right of such creditors accrued, and so *toties quoties*, at the expiration of every succeeding five years; and the senior Master shall forthwith re-enter the same, in like manner as

the same was originally entered, and such officer shall be entitled for any such re-entry to the sum of one shilling.

The following example may perhaps elucidate the effect of this section. Suppose *A.* to have purchased an estate twenty years previously to the sale to *D.*, whom we will imagine to be the present purchaser, and after a lapse of ten years, to have conveyed it to *B.*, who, after a further lapse of four years, conveyed it to *C.*, the present vendor; here it would have been necessary, under the old law, for *D.* to have searched for judgments from the commencement of the twenty years, in the name of *A.*, until the date of his conveyance to *B.*; in the name of *B.*, until the date of his conveyance to *C.*; and in the name of *C.*, to the time of search. But supposing a similar case to occur under the new law, it will be sufficient to search in the names of *A.*, *B.*, and *C.*, for five years previously to the conveyance to *D.*, and this search will be necessary as against *A*, and *B.*, although more than five years will have elapsed since they respectively parted with the estate; because judgments originally entered up against them, previously to their respective alienations, may, after such alienations, have been revived by

re-registration under the new act, so as to be subsisting liens upon the estate as against subsequent purchasers.

It is obvious that this section leaves the doctrine of notice untouched, in precisely the same way as the act to which it is supplementary. If the section declared that every judgment, of which a memorandum had not been left with the senior master within five years, should be void to all intents and purposes, then by analogy to the cases upon the annuity acts, equity could not, under any circumstances, revive it; but, as it is only made void as against purchasers, &c., it must, for the reasons before stated, be held that the doctrine of notice is not here excluded. In the case of *Davis* v. *Earl of Strathmore*,[k] Lord *Eldon* states with great clearness, the principle upon which this distinction is founded. The question there was whether a purchaser could be affected by an undocketed judgment, of which he had notice, and his lordship in giving judgment in the affirmative uses these words, "The court, particularly in questions upon the annuity act, has acknowledged the distinction between acts of parliament denying legal effect to certain instru-

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[k] 16 Ves. 428.

ments, and declaring them void to all intents and purposes; collecting from the more extensive words the inference that the equitable, as well as the legal, jurisdiction was intended to be prohibited. Upon that express distinction, the doctrine upon the annuity act has proceeded, as, if that act had merely declared that the instrument should be void, all the contract would still have remained; under which, though no interest passed, a right would have been created, giving the Court a power to interpose; but the act declaring the instruments void to all intents and purposes, and its policy requiring that they should not be set up to any intent or purpose: this Court refused by the exercise of its equitable jurisdiction to do what it had done upon the registry act, and the more ancient act as to bargains and sales, upon which acts, though declaring that the instrument, if not enrolled or registered, shall be void, yet there being a contract between the parties, that the one shall be vendor and the other vendee, with a covenant for further assurance, the conscience of the party was held to be bound, notwithstanding the statute."

The observations we have already made on the subject of notice, in commenting upon the new provisions for registering judgments may be repea-

ted here; but it may be questioned whether the act,[1] which was passed to exclude the equitable doctrine of notice in the construction of those provisions, prevents its application to the section we are now considering. As all reference to the intermediate statute is omitted in this act, it may be contended that, although a judgment creditor who has neglected altogether to leave a memorandum of his judgment with the registering officer will not be able to use his new remedies against purchasers on the ground of notice, yet one who has once left the memorandum, but has neglected at the expiration of five years again to leave it, will avoid the consequences of this neglect by proving notice. It cannot be supposed that this result was ever intended, and it may be fairly insisted that a judgment which has not been registered for five years must be regarded with respect to third persons to all intents and purposes as if it had never been registered. This remedial act would in all probability receive a liberal construction, and its operation be extended: but until it has been decided to relate to the provisions

[1] 3 & 4 Vict. c. 82, s. 2.

for the re-registration of judgments in the intermediate statute, as well as to those for registry in the 1 & 2 Vict. c. 110, it will be unsafe for purchasers for any purpose to disregard judgments once registered, of which, by themselves or their agents, they have actual notice.

It is to be borne in mind, that these provisions in the new acts on the subject of registration have a particular object in view, and will not affect any judgment as between the principal debtor and creditor, and their representatives. If the proper entries have been made, the creditor by judgment cannot be deprived of those rights and priorities, which the law allows to a debt of that nature against third parties. If they have been neglected, the creditor will lose his lien, so far as those parties are concerned; but in the former case, as against purchasers *without notice*, he has only his old remedies; and in the latter, he will be allowed his remedies against purchasers, &c. *with notice*, so far as the equitable doctrine is not affected by the 3 & 4 Vict. c. 82.

Between the principal debtor and creditor, or their representatives, or volunteers, the only enquiry will be, whether the judgments have been entered up within the period named in the

Statute of Limitations,[m] *i. e.* twenty years, or, if not, whether they have been kept alive by a revival by *scire facias*, or by any payment or written acknowledgment on the part of the debtor, within that period.

It will, therefore, be evident that all the requisitions of the 4th section of the 2 & 3 Vic. c. 11, may have been satisfied, and yet that lapse of time, with no revival or intermediate acknowledgment, may have determined the judgment with reference to all parties.

Before concluding these observations, it will be necessary to notice the recent case of *Whitworth* v. *Gaugain*,[n] in which a question was incidentally discussed, which, from its importance and apparent novelty, has attracted a very considerable share of attention. The facts were shortly as follows: George Cook, being indebted to the plaintiffs, who were bankers, deposited with them certain title deeds, and signed a memorandum, stating the deposit to have been made as a security for the repayment of the debt. Actions were afterwards commenced against Cook by two other creditors,

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[m] *Supra*, 53.

[n] 1 Cr. & Ph. 325.

and judgments signed. *Elegits* were thereupon sued out, and the creditors were put into possession of the lands comprised in the deeds which were deposited with the plaintiffs, and on the following day the tenants of these premises signed declarations of attornment to the creditors. The case made by the bill was that the judgments were the result of fraud and collusion, for the purpose of depriving the plaintiffs of their security, and that no debt was really due from Cook to the parties who brought the actions. Upon a motion being made before the Vice Chancellor for a receiver, the creditors filed affidavits in opposition expressly denying all the facts on which the plaintiffs relied as constituting a case of fraud. The Vice Chancellor, however, granted the motion on the ground that, although the charge of fraud was negatived, yet there was no denial of notice of the plaintiff's title at the time possession was taken under the *elegits*.

A motion was afterwards made before Lord *Cottenham*, to discharge his Honour's order; and a further affidavit having, in the mean time, been filed containing an express denial of notice, the plaintiffs attempted to support the order on the general ground that an equitable mortgagee had

priority over a title by *elegit* under a judgment subsequent to the mortgage, although such title was obtained without notice of the mortgage. But Lord Cottenham discharged the Vice Chancellor's order on the ground that the case made by the bill had been displaced by the affidavits, and adverted, in the course of his judgment, to the question of priority in the following terms :— "In the argument, however, at the bar a totally different turn was given, or attempted to be given, to the plaintiff's case. It was attempted to be said that, independently of the question of fraud, the plaintiffs had by law a preferable title to the defendants. Now if that be so, it is quite immaterial to the plaintiffs whether the *elegits* were fraudulent or not. In short, it would be a hopeless piece of fraud to manufacture that which, when manufactured, would have no effect against the plaintiff's equity. It is clear, therefore, that that is not the ground on which the bill was filed. It is quite sufficient for the present purpose to say that that is not the case made. It is not made upon the pleadings; it was not made in argument before the Vice Chancellor, and is suggested for the first time when it comes to be argued before me. I therefore abstain from going further into that

question than to say that if the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed by interlocutory order, because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which, under the authority of an act of parliament, they had a right to hold, the *elegit* being the creature of the act of parliament; and therefore they have a parliamentary title to hold the land as against all persons, unless an equitable case can be made out to induce this Court to interfere. I was a good deal struck, at the time it was quoted, with the case of *Casberd* v. *The Attorney General*,[o] decided in the Exchequer by a high authority, and evidently after very considerable pains had been taken to ascertain the state of the law on the subject: but I was very much relieved when I read that case, because I observed the Chief Baron puts it entirely upon this—that it was not a contest between a

[o] 6 Price, 411.

legal title and an equitable claim, but that there was no legal title. When that case therefore comes to be examined, it is not only no authority for the argument of the plaintiffs, but it seems that, if there had been a legal title against which the claim of the equitable mortgagee was contending, that legal title would have prevailed. However I do not enter further into that question than to explain what I conceive to be the result of the case of *Casberd* v. *The Attorney General.* It is quite sufficient for the present purpose, that the plaintiffs have failed in making out the case on which they ask for the interference of the Court."

In *Langton* v. *Horton*,[h] G. Birnie assigned a ship, with its future cargo, to the plaintiffs, as a security for an existing debt, and further advances. On the arrival of the ship, a managing clerk and agent for the plaintiffs was put on board to take possession of her for them. The defendant, under a judgment obtained subsequently to the assignment, sued out execution, and the proceeds of the sale were ordered to be paid into Court to abide the event of the suit. Sir *J. Wigram*, V. C., after

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[h] Leg. Obs. p. 414, Sept. 10th, 1842.

deciding that a future cargo could be the subject of equitable assignment, and that the assignees had perfected their equitable title by taking possession, made the following observations with respect to the right of the judgment creditor:—"All I understand Lord *Cottenham* to have said in *Whitworth* v. *Gaugain*, is, that in that interlocutory stage of the case, he thought he could not go so far as to deny the right of the judgment creditor. If a different principle were followed, I do not see how any equitable property could be safe, because if it once comes to this that equitable property may be taken in execution by a creditor of the trustee, how are you to prevent the application of that rule to the case of the holder of property in any other character whatever. I am perfectly satisfied that Lord *Cottenham* never could have meant to lay down any such general principle as that which I am required to apply to this case. In truth, the difficulty is got over here,—that was the case of an equitable mortgagee by the deposit of title deeds, who was out of possession of the property, and had never sought to affect himself by actual possession. Here, when the judgment creditor arrives, he finds the person who had contracted to become the owner of the pro-

perty had, under his supposed right, (a right which I think perfectly good in equity,) taken possession already of this very property. If anything could perfect an equitable title, that would do it. Therefore this case goes very much beyond the position of the parties in *Whitworth* v. *Gaugain*. What I rely upon, is the general principle that there having been such a contract between Birnie and the plaintiffs as would, in equity, give them this cargo when it arrived, and that having been perfected by possession lawfully taken under the deed, upon the arrival of the ship, there being no attempt to impeach it on the part of Birnie, or others, the judgment creditor cannot take it from the parties who actually got possession of the property, and who, in equity, were entitled to take possession." His Honour afterwards added, "I wished to observe as to *Whitworth* v. *Gaugain*, that, as I understand it, Lord *Cottenham* only meant to say that he would not decide against a judgment creditor until it was proved that the other party had a perfect equity. He did not mean to throw out, as I understand it, that if the equitable title were perfected, the judgment creditor could override it. I do not think he meant to say more than that upon an interlocutory ap-

plication, he could not decide whether there was, or not, a good equity."

These remarks of Sir *J. Wigram*, V. C., in explanation of Lord *Cottenham's dictum* in *Whitworth* v. *Gaugain*, are entitled to great respect. It is certain, however, that that *dictum* has produced a general impression that if the question had come immediately before the Court, Lord *Cottenham* would have held that a judgment creditor, without notice, in possession under his *elegit*, is entitled to preference over an equitable incumbrancer with a prior charge. The circumstances in *Langton* v. *Horton*, are importantly different from those in *Whitworth* v. *Gaugain*; and it will be observed that a distinction was expressly taken by Sir *J. Wigram* between the two cases. The former case was that of an assignment of personal chattels perfected by actual possession. The latter was that of a mortgage of real estate; the mortgagor had a perfect legal title, and was in possession of the property at the time of the execution. The question, therefore, to which Lord *Cottenham* was applying his remarks, must be considered to be still open to discussion.

It is difficult to understand Lord *Cottenham's* observation, that a tenant in possession under an

elegit has not, to all intents and purposes, an *estate*. The title he takes, is to hold until the debt be levied by a reasonable extent. These words would undoubtedly, if used in a deed, pass a clear estate, being within the principle of the case, so frequently put in text books, of a conveyance to a man until he goes to Rome. But there is a peculiarity in the interest of the tenant by *elegit*, which Lord *Coke* thus explains: "These tenants have uncertain interests in lands and tenements, and yet they have but chattels, and no freeholds, because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid, yet it shall go to their executors, for *ut* is similitudinary, and although to recover their estates they shall have the same remedy as a tenant of the freehold shall have, yet it is but the similitude of a freehold, *et nullum simile est idem*."[q] The better reason may be, that as the debt goes to the executor, so should also the security; but Lord *Coke* certainly here recognises the possession of an actual estate, and only shews that the interest the tenant by *elegit*

[q] Co. Litt. 42, 43.

takes in the land is, for the purpose of devolution, personal estate, though given by words which would in general make it descendible on the heir. In another place Lord *Coke* gives the definitions of the several terms "estate, right, title, and interest," and, under the first of these, he expressly classes the tenancy by *elegit*.[r]

We shall now proceed to the more immediate consideration of the question—To whom is a Court of Equity to give the priority?—to the equitable mortgagee of the specific property, or to the tenant by *elegit*, whose judgment was subsequent in point of time to the lien of the mortgagee, but who had no notice of the prior specific charge up to the period when he took possession under the writ?

Where there are two persons who have equal equity, and there is no legal title to affect the priority, the principle is *qui prior est in tempore potior est in jure*;[s] but of two persons who have equal equity, if one of them has the legal title, there is no equity to take from him the title that

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[r] Co. Litt. 345.

[s] *Brace* v. *Duchess of Marlborough*, 2 P. Wms. p. 495.

he has gained at law. If, therefore, a second mortgagee advances his money without notice of the previous incumbrance, and possesses the legal estate, he, having the legal estate in addition to an equity equal to that of the first mortgagee, is entitled to priority.[t] But, perhaps, there have been few points better settled in courts of equity than that in a contest between a creditor by judgment before he has sued out his *elegit*, and a person who has a prior equitable title, the latter must have been preferred, as having (at least before the 1 & 2 Vict. c. 110,) the better equity.

In *Burgh* v. *Francis*,[u] *H. F.*, by feoffment, *without livery*, mortgaged an estate in fee to secure the sum of 400*l.*, and thereby entered into covenants for title. He afterwards borrowed a sum of money on bond, and then made his will, and appointed his son executor, who, after the death of his father, confessed several judgments on bonds entered into by his father. The judgment creditors endeavoured to postpone the mortgagee, on the ground that they had a lien at law; but the Court decided that although the mortgage was

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[t] 2 Cru. Dig. 159. [u] 5 Bac. Abr. 662; 3 Swanst. 536.

defective in law for want of livery, yet, the estate being specifically bound in equity by the mortgage, it could not be affected by the subsequent judgments, as they constituted a mere general lien upon the land. Again, in *Lodge* v. *Lyseley*,[v] Sir *L. Shadwell* said, "It appears to me that from the time that *H. A. S.* entered into binding contracts to sell his estates to purchasers, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed; and if he had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them."

Many other cases might be particularly mentioned, which decided under the old law that a judgment creditor must take subject to all the prior equities.[w] But the case to which Lord *Cottenham* applied his remarks, was not that of a judgment creditor, who, as

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[v] 4 Sim. 75.

[w] See *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 277; *Brace* v. *Duchess of Marlborough*, 2 P.Wms. 490; *Ex parte Knott*, 11 Ves. Jun. 617; *Averall* v. *Wade*, 1 Lloyd & Goold, 262; See also *Oxwick* v. *Plumer*, Gilb. Cas. in Equity. p. 13.

such, previously to the 1 & 2 Vict. c 110, had neither jus *in re* nor *ad rem*. The equitable mortgagee was there contending with one who had sued out his writ, had legal seisin of the specific lands delivered to him, and who had obtained declarations of attornment from the tenants to himself. He was, as it is conceived, in possession of an actual estate.

In *Neate* v. *Duke of Marlborough*,[x] Lord *Cottenham* observed, "What gives a judgment creditor a right against the estate, is only the Act of Parliament, for independently of that he has none. The Act of Parliament gives him, if he pleases, an option by the writ of *elegit*—the very name implying that it is an option—which if he exercises, he is entitled to have a writ directed to the sheriff, to put him in possession of a moiety of the lands. The effect of the proceeding under the writ, is to give the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment." There is, therefore, a manifest and important difference between the creditor before execution, and such creditor after he has sued

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[x] 3 Myl. & Cr. 417.

out his *elegit*, and obtained his parliamentary title to hold the land.

The reason assigned by Lord Chancellor *Sugden* in *Averall* v. *Wade*,[z] why a person claiming under a defective conveyance, was not affected by a subsequent judgment, is, that the creditor had no specific lien on the estate of his debtor. When, however, the creditor has obtained possession of the lands under his *elegit*, he acquires a specific interest, which, together with his legal title, would seem to be all that is requisite to entitle him to the priority contended for.

But it has been insisted, that although the tenant by *elegit* obtains a specific interest under the execution, yet, inasmuch as he takes the legal estate *by the act of law*, he must take it subject to all the equities to which it was liable in the hands of the debtor; and the case of *Taylor* v. *Wheeler*,[a] has been thought to be favourable to this position. In that case, *A.* surrendered a copyhold estate by way of mortgage, and the surrenderee was not presented at the next court, according to the custom of the manor. *A.* became a bankrupt,

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[z] 1 Lloyd & Goold, p. 262.

[a] 2 Vern. 564.

and the assignees of the bankrupt were admitted, and brought their ejectment. The surrenderee of the copyhold estate having brought his bill in equity to be relieved, the court decreed a perpetual injunction in his behalf. Now the distinction between the two cases must be evident. It seems clear that the tenant by *elegit* must be considered a purchaser. He claims adversely to the interest of the debtor, and is considered to have obtained satisfaction of his debt by the specific interest which is delivered to him under the *elegit*; whereas the estate, which the assignees of a bankrupt acquire, is cast upon them as the representatives of the bankrupt, in trust for the general body of his creditors, and consequently there could be no equity to entitle such assignees, who are not considered purchasers for a valuable consideration, to take otherwise than subject to whatever equity the bankrupt was liable to. The distinction between such assignees and a particular assignee for a valuable consideration, is fully recognised by Sir *William Grant* in *Mitford* v. *Mitford*.[b] He

[b] 9 Ves. 100.

there observes—"Even where a complete legal title vests in assignees under a commission of bankruptcy, and there is notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shews they are not considered purchasers for valuable consideration, in the proper sense of the words. Indeed, a distinction has been constantly taken between them, and a particular assignee for a specific consideration; and the former are placed in the same class as voluntary assignees and personal representatives."

The act confers upon the creditor a title to take what the debtor might have voluntarily disposed of. It gives him a right, at any time, to exchange his general for a specific security. If the debtor had, by writing under his hand, placed the creditor in possession of the estate which he has gained under the authority of the act of parliament, it is clear that he would be entitled to priority over a previous equitable interest. What then is to prevent the tenant by *elegit* from claiming under his extent, the benefit to which he would have been entitled if the lands had been delivered to him by the debtor, and the whole transaction had

been the result of an actual contract between the parties?

It has been further contended, that a tenant by *elegit* cannot be entitled to this priority, because his money was not originally lent upon the faith of the land: but it must be remembered, that the creditor acquires a legal right from the period of entering up his judgment to have the lands specifically delivered to him for the satisfaction of his debt. From the time of the extent, therefore, he relies upon the land for satisfaction. What then have we to do with the precise nature or effect of the security before the execution?

It is, indeed, open to argument, that under the 13th section of the 1 & 2 Vict. c. 110, the judgment creditor now obtains, from the date of the judgment, an equity equal to that of a person having a prior charge, or, at any rate, it is submitted that the equities are rendered equal from the date of the execution. In *Whitworth* v. *Gaugain*, the judgment creditors had obtained actual possession under their *elegits*, without notice of the prior charge, and it therefore seems to follow, that there could be no equity to take from such creditors the legal estate delivered to them by the sheriff.

By keeping in view the distinction which has been taken between the judgment creditor before execution, and such creditor after he has sued out his *elegit* and extended the lands, it will, we think, be obvious that those cases wherein the court was adjudicating on the rights of the former, have no application to the present question. In short, it seems more consistent to hold, as the law at present stands, that the interest of a tenant by *elegit* more nearly resembles that of a legal mortgagee or purchaser, who retains his estate against all prior equities, of which he had no notice when he advanced his money.

APPENDIX.

THE ENACTMENTS RELATIVE TO JUDGMENTS AS THEY AFFECT REAL PROPERTY, CONTAINED IN THE 1 & 2 VICT. C. 110; 2 & 3 VICT. C. 11; AND THE 3 & 4 VICT. C. 82;

AND ALSO

THE ENACTMENTS CONTAINED IN THE 3 & 4 VICT. C. 105, WITH RESPECT TO JUDGMENTS IN IRELAND.

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1 & 2 VICT. CAP. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain Cases: for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16th August, 1838.]

Warrant of attorney and cognovit actionem to be executed in the presence of an attorney on behalf of the person.

9. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a cognovit actionem, due information of the nature and effect thereof; be it enacted, that from and after the time appointed for the commencement of this act no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature

and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

Warrant, &c. not formally executed invalid.

10. And be it enacted, that a warrant of attorney to confess judgment or cognovit actionem, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

Sheriff empowered to deliver execution of lands &c. to judgment creditor.

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards,

have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: Provided always, that such party suing out execution, and to whom such copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor, or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued; and that the party so suing out such execution and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed.

Proviso as to copyhold lands.

Proviso as to purchasers, mortgagees, or creditors.

13. And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior courts at Westminster shall

Judgment to operate as a charge on real estate.

operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this act, until

Charge not to be enforced until after the expiration of a year.

after the expiration of one year from the time appointed for the commencment of this act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice.

Proviso as to purchasers, &c.

16. And be it enacted, that if any judgment creditor, who under the powers of this act shall have obtained any charge or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.

Securities not realized to be relinquished if the person taken in execution.

17. And be it enacted, that every judgment debt shall carry interest at the rate of four pounds *per centum per annum* from the time of entering up the judgment or from the time of the commencement of this act, in cases of judgments then entered up and not carrying interest,

Judgment debts to carry interest.

until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.

Decrees and orders of courts of equity, &c. to have effect of judgments.

18. And be it enacted, that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expences shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the person to whom any such monies, or costs, charges or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid.

No judgment, decree, &c. to affect real estate, by virtue of this act, as to purchasers, &c until registered.

19. Provided always, and be it further enacted, That no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the

court and the title of the cause or matter in which such judgment, decree, order, or rule, shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for any such entry to the sum of five shillings: and all persons shall be at liberty to search the same book on payment of the sum of one shilling.

New writs to be framed.

20. And be it enacted, that such new or altered writs shall be sued out of the courts of law, equity, and bankruptcy as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act.

Powers, &c. of this act applicable to the courts and judges at Westminster to be applicable to courts of

21. And be it enacted, that all the remedies, authorities, and provisions of this act applicable to her Majesty's superior courts of common law at Westminster, and the judgments and proceedings therein, shall extend to and be applicable to the Court of Common Pleas of the county

Lancaster and Durham.

palatine of Lancaster and the Court of Pleas of the county palatine of Durham, within the limits of the jurisdiction of the same courts respectively; and the judgments of each of the said last-mentioned courts shall, within the limits of the jurisdiction of the same courts respectively, have the same effect in all respects as the judgments of any of her Majesty's said superior courts at Westminster under and by virtue of this act; and all powers and authorities hereby given to the judges or any judge of her Majesty's superior courts at Westminster with respect to matters depending in the same courts shall and may be exercised by the judges or any judge of the said Court of Common Pleas at Lancaster, or the justices or any justice of the said Court of Pleas at Durham, with respect to matters therein depending, and within the jurisdiction of the same courts respectively:

No judgment of those courts to affect real estate by virtue of this act, as to purchasers &c. until registered.

Provided always, that no judgment of either of the same last-mentioned courts shall, by virtue of this act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and title, trade, or profession of the plaintiff and defendant, the date when such judgment was signed, and the amount of the debt, damages, and costs thereby recovered, shall be left with the prothonotary or deputy prothonotary, or some other officer to be appointed for that purpose by the said courts respectively, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is to be affected thereby: and such officer shall be entitled for every such entry to the sum of two shillings and six pence: and all persons shall be at liberty to search the same book on payment of the sum of one shilling:

And provided also, that no order or other proceeding under this act made by any justice or justices of the said Court of Common Pleas of the county palatine of Lancaster, or the Court of Pleas in the county palatine of Durham, shall be valid or effectual except made in open Court on one of the Court or return days of the same court, or except such justice or justices shall be also a judge or judges of one of the said courts at Westminster; Provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice or justices of the Court of Pleas in the county palatine of Durham who shall not be a judge or judges of one of the said courts of common law at Westminster.

For removal of judgments of inferior courts.

22. And be it enacted, that in all cases where final judgment shall be obtained in any action or suit in any superior court of record in which, at the time of passing of this act, a barrister of not less than seven years standing, shall act as judge, assessor, or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid, whereby any sum of money, or any costs, charges or expences shall be payable to any person, it shall be lawful for the judges of any of her Majesty's superior courts of record at Westminster, or if such inferior court be within the county palatine of Lancaster, for the judges of the Court of Common Pleas at Lancaster, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who, at the time of the commencement of this act, shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges

or expences shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule or order, as the case may be, being respectively under the seal of the inferior court and signature of the proper officer thereof, to order and direct the judgment, or, as the case may be, the rule or order, of such inferior court to be removed into the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be; and immediately thereupon such judgment, rule or order, shall be of the same force, charge, and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said superior court, or into* the Court of Common Pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order; Provided always, that no such judgment or rule or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior court, and unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same.†

* (Sic.)

Proviso as to purchasers, &c.

† The 121st section enacts that this act shall not extend either to Scotland or Ireland, except where expressly mentioned.

2 & 3 VICT. CAP. 11.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis Pendens, and Fiats in Bankruptcy. [4th June, 1839.]

No judgments to be hereafter docketted under the provisions of 4 & 5 W. & M. c. 20

1. Be it enacted, that no judgment shall *hereafter* be docketed under the provisions of an act passed in the fourth and fifth years of the reign of their late majesties King William and Queen Mary, intituled "An Act for the better discovery of judgments in the Courts of King's Bench, Common Pleas, and Exchequer, at Westminster," but that all such dockets shall be finally closed immediately after the passing of this act, without prejudice to the operation of any judgment already docketed and entered under the said recited act, except so far as any such judgment may be affected by the provisions hereinafter contained.

As to judgments already docketed and entered.

2. And be it enacted, that no *judgment already docketed* and entered under the said recited act of their late majesties King William and Queen Mary, shall *after the first day of August, one thousand eight hundred and forty-one*, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof, as is prescribed in an act passed in the first and second years of her present majesty Queen Victoria, intituled "An Act for abolishing arrest on *mesne process* [in] civil actions, except in certain cases;

I & 2 Vict. c. 110.

for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England," shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings.

The date when the memorandum of judgment, &c., is left, to be entered in a book.

3. And be it enacted, that in addition to the entry by the said last-mentioned act or by this act required to be made in a book by the Senior Master, of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him.

Judgments after five years from entry, to be void against purchasers, &c., unless a fresh memorandum is left

4. And be it enacted, that all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which, since the passing of the said recited act of the first and second years of the reign of her present majesty have been registered under the provisions therein contained, or which shall hereafter be so registered, shall after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the Senior Master of the said Court of Common Pleas *within five years before the execution of the conveyance.* settlement, mortgage lease, or other deed or instrument, vesting or transferring the *legal* or *equitable* right, title, estate, or interest, in or to any such purchaser or mortgagee for valuable consideration, *or as to creditors, within five years before the right of*

such creditors accrued, and so *toties quoties*, at the expiration of every succeeding five years; and the senior master shall forwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shiling.

Judgments, &c., not to affect purchasers or mortgagees more extensively than judgments would have done before the statute 1 & 2 Vict. c. 110.

5. Provided also, and be it enacted, that, *as against purchasers and mortgagees without notice* of any such judgment, decrees or orders, rules or orders as aforesaid, *none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid would have bound such purchaser or mortgagee before the said act of the first and second years of the reign of her present Majesty*, where it has been duly docketed, according to the law then in force.

Acts not to revive judgments extinguished or barred, nor to affect judgment creditors' rights against the debtor and volunteers.

6. Provided always, and be it enacted, that nothing in the said recited act of her present Majesty, nor in this act contained, shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment as between the parties thereto, or their representatives, or those deriving as volunteers under them.

3 & 4 VICT. CAP. 82.

An act for further amending the Act for Abolishing Arrest on Mesne Process in Civil Actions. [7th August, 1840.]

No judgment, decree, &c. to affect real estate, until memorandum left with the senior master of the Common Pleas.

2. And whereas it was by the said act further enacted, That no judgment of any of the superior courts of common law at Westminster, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, should, by virtue of the said act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as therein mentioned should be left with the senior master of the Court of Common Pleas at Westminster: And whereas doubts have been entertained whether a purchaser, mortgagee, or creditor, having notice of any such judgment, decree order, or rule as aforesaid, would not in equity be affected thereby notwithstanding such a memorandum or minute of the same as in the said act is mentioned may not have been left with the senior master of the said Court of Common Pleas; Be it therefore further declared and enacted, that no such judgment, decree, order, or rule as aforesaid shall, by virtue of the said act, affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the senior master of the said Court of Common Pleas at Westminster; any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in any wise notwithstanding.

JUDGMENTS.—IRELAND.

3 & 4 VICT. CAP. 105.

An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain cases; for extending the Remedies of Creditors against the Property of Debtors; and for the further Amendment of the Law and the better Advancement of Justice in Ireland. [10th August, 1840.]

Warrants of attorney or *cognovit actionem* to be executed in the presence of an attorney on behalf of the person, except warrants collateral with bonds.

10. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a *cognovit actionem* (save as hereinafter mentioned) due information of the nature and effect thereof; be it enacted, that from and after the time appointed for the commencement of this act, no warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, save and except a warrant of attorney to confess judgment in an action upon a bond or writing obligatory recited therein, or collateral therewith, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a

witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

Warrant &c. not formally executed invalid.

11. And be it enacted, that a warrant of attorney to confess judgment, or *cognovit actionem*, (save and except as aforesaid) not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

Warrants of attorney in personal actions to be filed within twenty-one days.

12. And whereas injustice is frequently done to creditors by secret warrants of attorney to confess judgments for securing the payment of money, whereby persons in a state of insolvency are enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney have the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors; for remedy whereof, be it enacted, that from and after the first day of November, one thousand eight hundred and forty, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsement thereon (if any), shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the proper officer in one of her Majesty's superior courts at Dublin, in which judgment upon such warrant of attorney shall thereafter be entered up.

In what case warrant of attorney, &c. deemed fraudulent and void.

13. And be it enacted, that from and after the first day of November, one thousand eight hundred and forty, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall

have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, or any such person shall be imprisoned for debt and file a petition in the court for relief of insolvent debtors, whereon a vesting order shall be made under the provisions of any act to continue and amend the laws for relief of insolvent debtors in Ireland, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period and in the court in which such warrant of attorney or such copy thereof shall have been filed, such warrant of attorney and the judgment and execution thereon shall be deemed fraudulent and void against the assignees under such commission, and against the provisional or other assignee or assignees of such prisoner, appointed under such act, and such assignee or assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt or prisoner, all and every the monies levied or effects seized under and by virtue of such judgment and execution.

Defeasance of warrant of attorney &c., to be written on the same paper.

14. And be it enacted, that if such warrant of attorney shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper on which such warrant of attorney shall be written before the time when the same, or a copy thereof respectively, shall be filed, otherwise such warrant of attorney shall be null and void to all intents and purposes.

Officers of Court to keep a book containing lists and particu-

15. And be it enacted, that the said officer of the said court, in which such warrant of attorney or copy thereof shall be filed, shall cause every such warrant of attorney

lars of each warrant of attorney.

in any personal action, and every copy thereof filed in his said office to be numbered, and shall keep a book or books in his said office, in which he shall cause to be fairly entered, an alphabetical list of every such warrant of attorney, containing therein the names and additions and descriptions of the respective defendants or persons giving such warrants of attorney, and also the names, additions, and descriptions of the plaintiff or persons in whose favor the same shall have been given, together with the number and dates of the execution and filing of the same, or of a copy thereof respectively; and the sums for which judgment is to be entered up, and also the sums which are specified to be paid by the defeasances or conditions in each warrant of attorney, and the times when the same are thereby made payable, according to the form contained in the schedule (B.) to this act annexed, which said book or books, and every warrant of attorney or copy thereof, filed in the said office, shall be searched and viewed by all persons at all seasonable times, paying for every search against each person executing such warrant of attorney, the sum of sixpence, and no more.

Fee for filing warrant.

16. And be it enacted, that there shall be paid for filing and entering such warrant of attorney, or a copy thereof as aforesaid, the sum of one shilling, and no more.

Office copy had on paying for.

17. And be it enacted, that any person shall be entitled to have an office copy of each warrant of attorney, or of the copy thereof, filed as aforesaid, in like manner as office copies of judgments in each such court respectively.

Satisfaction to be entered on warrant of attorney:

18. And be it enacted, that it shall be lawful for any of the judges of the court in which the said warrant of attorney or copy thereof is filed, to order a memorandum of satisfaction to be written upon such warrant of attorney, or copy thereof respectively, as aforesaid, if it shall appear

to him or them that the debt for which such warrant of attorney is given as a security shall have been satisfied or discharged.

Sheriff empowered to deliver execution of lands &c. to judgment creditors.

19. And whereas the existing law is defective, in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore enacted, that it shall be lawful for the sheriff or other officer, to whom any writ of elegit or any precept in pursuance thereof shall be directed, at the suit of any person upon any judgment which, at the time appointed for the commencement of this act, shall have been recovered or shall be thereafter recovered in any action in any of her Majesty's superior courts at Dublin, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments which may be of copyhold tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment or at any time afterwards, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out, which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution

shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out, as a tenant by elegit is now subject to in a court of equity: Provided always, that such party suing out execution and to whom any copyhold lands may be so delivered in execution, shall be liable, and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments and the value of such services, as well as the amount of the judgment, shall have been levied:

Proviso as to Copyhold

Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed.

Proviso as to purchasers, mortgagees, or creditors.

22. And be it enacted, that a judgment already entered up, or to be hereafter entered up against any person, in any of her Majesty's superior courts at Dublin, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments, including lands and hereditaments of copyhold tenure, of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any

Judgment to operate as a charge on real estates.

disposing power, which he might, without the assent of any other person, exercise for his own benefit; and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the consent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity, against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon: Provided, that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge under this act, until after the expiration of one year from the time of entering up such judgment; or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act; nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy; Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment

Charge not to be enforced until after expiration of a year.

Proviso as to purchasers, &c.

affect real estate, by virtue of this act, as to purchasers &c., until registered.

or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy shall, by virtue of this act, affect any lands, tenements or hereditaments, as to purchasers, mortgagees, or creditors, unless, and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and the title of the cause or matter in which such decree, order or rule, shall have been obtained or made, and the date of such decree, order, or rule, and the amount of the debt, damages, costs, or monies, thereby recovered or ordered to be paid, shall be left with such person, being any officer of the Court of Chancery, or of the Court of Exchequer, as the Lord Chancellor, Master of the Rolls, and Lord Chief Baron shall appoint, *any notice of any such decree, order, or rule, to any purchaser, mortgagee, or creditor, in anywise notwithstanding;* and such officer shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled, for any such entry, to the sum of five shillings, and all persons shall be at liberty to search the same book, on payment of the sum of one shilling.

New writs to be framed.

29. And be it enacted, that such new or altered writs shall be sued out of the Courts of Law, Equity, and Court of Commissioners of Bankrupt, as may by such courts respectively be deemed necessary or expedient, for giving effect to the provisions herein-before contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order, and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or

as near thereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act.

For removal of judgments of inferior courts.

30. And be it enacted, that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of the passing of this act, a barrister of not less than six years standing shall act as judge, assessor, or assistant in the trial of causes; and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid, whereby any sum of money, or any costs, charges, or expences shall be payable to any person, it shall be lawful for the Judges of any of her Majesty's Superior Courts of Record at Dublin, or for any Judge of any of the said courts at chamber, either in term or vacation, upon the application of any person who, at the time of the commencement of this act, shall have recovered, or who shall at any time thereafter, recover such judgment, or to whom any money or costs, charges, or expences shall be payable, by such rule or order as aforesaid, or upon the application of any person on his behalf; and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule, or order as the case may be, being respectively under the seal of the inferior court and the signature of the proper officer thereof, to order and direct the judgment, or (as the case may be) the rule or order of such inferior court, to be removed into the said superior court, and immediately thereupon, such judgment, rule, or order, shall be of the same force, charge, and effect as a judgment recovered in or a rule

affect real estate, by virtue of this act, as to purchasers &c., until registered.

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ERRATA.

Page [illegible] line [illegible] and [illegible], for "creditor" read "debtor."
[illegible], line [illegible], for "29 Car. 2, c. 3," read "29 Car. 2, c. 3."
[illegible], line [illegible] from bottom, for "has," read "as."
[illegible], line [illegible] from bottom, for "with practice," read "with the practice."
[illegible], note [illegible], for "[illegible]," read "[illegible]."
[illegible], line [illegible], for "notice" read "no notice."

INDEX.

THE END.

E. SPETTIGUE, Printer, 67, Chancery Lane.